92-1775

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

RAWL SALES AND PROCESSING COMPANY,

Petitioner,

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the statutory right to collectively bargain may be waived in perpetuity as a matter of national labor policy.

2. Whether a multi-employer bargaining association may waive in perpetuity the statutory right of an employer-member to bargain individually with the union representing its employees and do so without the member's knowledge.

3. Whether the courts must adhere to this Court's clear and unmistakable standard in discerning waivers of statutory bargaining rights or whether such waivers may be grounded on simple contract interpretation.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Rawl Sales and Processing Company and the Respondents, the Trustees of the United Mine Workers of America 1950 Pension Plan and Trust, the United Mine Workers of America 1950 Benefit Plan and Trust, the United Mine Workers of America 1974 Pension Plan and Trust, and the United Mine Workers of America 1974 Benefit Plan and Trust.

The Pittston Coal Group was also a defendant-appellant below. Rawl's case was consolidated with Pittston's for purposes of pre-trial proceedings. The decision of the Court of Appeals to which this Petition for Writ of Certiorari is directed also applies to the Pittston Coal Group. Rawl has been informed that the Pittston Coal Group will file a timely Petition for Certiorari on or before June 30, 1993.

The Respondents before this Court include the four pension and benefit plans named above and their Trustees.

RULE 29.1 DISCLOSURE

Rawl Sales and Processing Company is a wholly owned subsidiary of A.T. Massey Coal Company, Inc. A.T. Massey Coal Company Inc. is a wholly owned subsidiary of Fluor Corporation, a publicly traded corporation.

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RAWL SALES AND PROCESSING COMPANY,

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TRUSTEES, UNITED MINE WORKERS OF AMERICA
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Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Rawl Sales and Processing Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled proceeding on February 2, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 984 F.2d 469, and is reprinted in the appendix hereto at App-1, *infra*. The Court of Appeal's Orders on Rehearing and Suggestion for Rehearing En Banc are reprinted at App-74 and App-75, *infra*.

The Corrected Memorandum Opinion and Order of the District Court for the District of Columbia (Hogan, D.J.) is reported at 782 F. Supp. 658, and is reprinted in the appendix hereto at App-19, *infra*. The District Court's opinion on reconsideration is reported at 793 F. Supp. 339 and is reprinted in the appendix hereto at App-55, *infra*.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court for the District of Columbia on February 2, 1993. On March 5, 1993, Rawl filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc; both were denied by Orders dated March 31, 1993.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

29 U.S.C. § 151 Findings and Policies.

. . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practices and procedures of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 157. Rights of Employees.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3).

29 U.S.C. § 158(b)(1)(B)

(b) It shall be an unfair labor practice for a labor organization, or its agents --

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

A. The Facts

Petitioner Rawl Sales and Processing Company ("Rawl"), is a coal company. Respondents are Trustees of four multi-employer health and pension trust Funds ("Funds") which are part of the National Bituminous Coal Wage Agreement ("Wage Agreement"). This collective bargaining agreement is periodically negotiated by the Bituminous Coal Operator's Association ("BCOA"), a multi-employer bargaining unit comprised of competing coal companies, and the United Mine Workers Union ("Union"). Rawl was a member of BCOA until 1984, and its hourly production employees are represented by the Union.

The Funds are required to provide certain health and all pension benefits for eligible employees and pensioners of any company which contributes to the Funds. Contribution amounts and benefits are negotiated by BCOA and the Union as part of the negotiations for each Wage Agreement.[1/]

Beginning in 1974, Article XX(d) of each Wage Agreement imposed upon signatory companies an obligation to contribute to the Funds at specified rates "*[d]uring the life*

[1/] BCOA conducts its negotiations through officials of its largest member companies. The several hundred smaller members, such as Rawl, do not participate in bargaining. Rather, collectively they are advised of and asked to ratify the result.

of this Agreement . . . and ending when this Agreement is terminated." JA 710-11 (emphasis added).[2/] Until this litigation, the entire coal industry, the Trustees, the NLRB and the courts interpreted Article XX(d) to mean that an employer's obligation to contribute to the Funds ceased upon expiration of each Wage Agreement. Likewise, the benefits for employees provided through the Funds were guaranteed only for the term of each Agreement.

Rawl was signatory only to the 1978 and 1981 Wage Agreements, the latter expiring on September 30, 1984. Concerned that BCOA negotiated labor contracts suitable only to larger coal companies, Rawl gave timely notice of withdrawal from BCOA prior to expiration of the 1981 Wage Agreement.[3/] The lawfulness of Rawl's withdrawal from BCOA was not questioned. Upon leaving BCOA, Rawl sought to negotiate its own labor contract with the Union. Differences in these negotiations led Rawl and the Union into a labor dispute for the next four years. A primary issue in the dispute was whether Rawl would continue to participate in the Funds. JA 557.

[2/] Citations to the Joint Appendix below are designated as JA ___. Citations to the opinions of the lower courts are designated as App. ___.

[3/] Multi-employer bargaining is a frequently used bargaining structure in circumstances where one union represents the employees of a number of companies in one industry. The companies join together and bargain with the union for one contract applicable to all members of the group. Once an employer joins the group and bargaining begins, the employer is bound by the contract negotiated. However, upon expiration of the contract, an employer may withdraw from the group and bargain separately with the union for its own contract so long as it does so in a timely manner. *See* Patrick Hardin, *The Developing Labor Law* 508-522 (1992) and cases cited therein.

When the 1981 Wage Agreement expired in 1984, Rawl followed the uniform industry interpretation of the Wage Agreement and ceased making contributions to the Funds. Rawl subsequently received a ruling from the NLRB's General Counsel confirming that under the Wage Agreement, including the trust documents, the obligation to contribute to the Funds terminated with each expiring contract. JA 1017-19. The General Counsel cited Article XX(d) of the Wage Agreement as the basis for his interpretation.[4/]

In 1988, the Union and Rawl ended their dispute. They signed a new labor contract terminating Rawl's obligation to contribute to the Funds. They agreed to establish separate health and pension plans for Rawl's employees which Rawl has been funding since 1988.

The Trustees filed this suit in late 1990 alleging that companies like Rawl could never withdraw from the Funds. The Trustees' claim is based on a clause in trust documents incorporated into the Wage Agreement. The Trustees allege this clause bound Rawl, and all other former signatories to

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[4/] The Trustees interpreted the Wage Agreement similarly. From 1978 through 1988, the Trustees filed suit in federal court against numerous employers seeking withdrawal liability under ERISA, 29 U.S.C. § 1383 *et seq.* (1988). They prevailed in those cases by arguing that employers, like Rawl, who were no longer signatory to the Wage Agreement, but who continued to operate, permanently ceased to have an obligation to contribute to the Funds when the agreement to which the employers were signatory expired. *See, e.g., Combs v. Pelbro Fuel, Inc.*, 4 Employee Benefits Cas. (BNA) 2610 (D.D.C. 1984); *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986); *Connors v. Mulvehill*, 679 F. Supp. 1071 (N.D. Ala. 1988); *Garland Coal Co. v. UMW 1950 & 1974 Pension Trusts*, 7 Employee Benefits Cas. (BNA) 1771, 1772-73 (1986) (Dreyer, Arb.); *Connors v. Kelly Coal Co.*, JA 1045, 1057.

the Wage Agreement, to participate in the Funds in perpetuity on terms set exclusively by BCOA and the Union. According to the Trustees, Rawl's obligation to participate in the Funds terminates *only* when BCOA decides in its future negotiations to terminate it. This clause, labeled the "evergreen" clause for litigation purposes, was placed in the trust documents in 1978, after BCOA's members ratified the 1978 Wage Agreement.[5/] There is no dispute that BCOA never told its membership, including Rawl, that such an alleged commitment had been made on their behalf.

The Trustees' suit, brought pursuant to 29 U.S.C. § 1132(f) (1988), 29 U.S.C. § 185(a) (1988) and 28 U.S.C. § 1331 (1988) alleged that Rawl's 1988 contract with the Union was "ineffective" because only BCOA had authority to bargain concerning Rawl's continued participation in the Funds and the provision of benefits for Rawl's employees. They alleged that Rawl owed delinquent contributions pursuant to the 1984 and 1988 Wage Agreements which it did not sign. In addition, the Trustees claimed that Rawl is automatically obligated to make whatever contributions, and its employees will receive whatever benefits, BCOA chooses to negotiate in future Wage Agreements.

The meaning of Article XX(d) in the Wage Agreement and the evergreen clause in the trust documents lies at the heart of this case. Printed side by side, the clauses are follows:

[5/] The trust documents were not finally written until several months after ratification. JA 594-95. Because they were thought to pertain only to the Trustees' administration of the Funds, they were not routinely provided to employers.

Wage Agreement Article XX(d) Contribution By Employers	Clause in Trust Documents
(1) During the life of the Agreement, for the periods of time indicated below, each signatory Employer...shall contribute to the Trusts referred to in this Article...	Any Employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1974 Pension Plan, or any Employer who was or is required to make, or who has made or makes contributions to this 1974 Pension Plan and Trust is obligated and is required to comply with the terms of the 1974 Pension Plan and Trust as amended from time to time including but not limited to, making the contributions required under the NBCWA of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to the NBCWA of 1981.
(iii) Into the 1974 Pension Trust...for the period beginning...and ending when Agreement is terminated, $1.07 per hour...	
(3) The sole obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section.	

B. The Proceedings Below

Rawl and the Union, as *amicus*, urged the courts below to find, *inter alia*, that the "evergreen" interpretation of the Wage Agreement constituted an impermissible waiver of their statutory bargaining rights under this Court's decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The district court found the language in Article XX(d) of the Wage Agreement and the evergreen clause in the trust documents conflicting and ambiguous. After weighing the extrinsic evidence and resolving credibility conflicts, App. 38, 51, it granted the Trustees' Motion for Summary Judgment as to the meaning of the labor contract. It is not clear from the district court's opinion whether it applied this Court's *Metropolitan Edison* doctrine.

By contrast, the circuit court squarely addressed Rawl's waiver argument and clearly refused to apply the doctrine. In response to Rawl's argument that the Trustees' interpretation would amount to a waiver of Rawl's and the Union's bargaining rights, the court ruled:

> Finally, the Coal Companies argue that the Trustee's interpretation of the evergreen clause cannot have the effect of precluding employers from renegotiating contribution rates because, under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), bargaining rights are only subject to 'clear and unmistakable' waiver. This argument is specious and we reject it as such.

> As we explained in detail in *Link Coal*, the 'waiver' argument misses the distinction between the waiver of a right and the exercise of a right that extends into the future. 970 F.2d at 905. "[T]o the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining." *Id.* Here, the UMWA and the BCOA agreed on the basis for determining the employers' pension fund contributions. When the Coal Companies signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against the coal companies. There is no issue of waiver in this case.

App. 17.

In rejecting the waiver doctrine, the appellate court reasoned that the continuing viability of Rawl's and the Union's statutory rights to bargain with each other were simply a matter of interpreting provisions of the trust documents incorporated into the Wage Agreement. App. 6-11. In short, the court ruled that, in negotiating the 1978 Wage Agreement, BCOA permanently forfeited Rawl's individual right to bargain with the Union over contributions and benefits for Rawl's employees. The court also divested the Union of the right to bargain individually with Rawl on these mandatory subjects.

REASONS FOR GRANTING THE WRIT

This case presents issues of extreme importance under the labor laws:

National labor policy is premised on the right of employees and employers to bargain collectively. There simply is no precedent under American labor law for a union or an employer to waive that statutory right in perpetuity. Permitting a perpetual waiver immeasurably distorts the collective bargaining process, divests employers of the right to bargain their own contracts and interferes with the rights of employees and their bargaining representatives. A perpetual waiver of the statutory right to bargain should not be permitted as a matter of national labor policy.

Likewise, labor policy should not permit a multi-employer bargaining agent to waive in perpetuity a member's statutory right to bargain collectively. Multi-employer bargaining is a common bargaining structure approved by Congress and utilized by countless industries including trucking, coal, railroad and construction. It is a voluntary process into which neither unions nor employers may be coerced against their will. Until this case, the courts, including this Court, and the NLRB have ruled uniformly that an employer always has the right to withdraw from multi-employer units to negotiate a separate contract with the union representing its employees. If, as this case holds, the multi-employer group can waive these rights on behalf of unsuspecting members, employers will not participate, frustrating the effectiveness of an important collective bargaining technique useful to employers and unions alike.

Even if perpetual waivers of bargaining rights are lawful, such waivers should only be given effect if clear and unmistakable. The circuit court's opinion permitting a waiver of statutory rights based on simple contract interpretation conflicts with the standards for such waivers set by this Court and followed by the majority of circuit courts.

I. A PERPETUAL WAIVER OF THE RIGHT TO BARGAIN IS UNPRECEDENTED AND SHOULD NOT BE PERMITTED AS A MATTER OF NATIONAL LABOR POLICY

A. This Is A Waiver Case

The circuit court decided that, "there is no issue of waiver in this case" because "[t]o the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining." App. 17. This analysis is too simple. It is based on the unremarkable premise that an employer and a union may agree to a commitment which extends beyond the term of the contract signed. For example, they may agree that all future increases in pension benefits beyond the term of the contract will be tied to the Consumer Price Index rather than future bargaining. They may agree that the health care benefits prescribed by the contract will continue for 90 days or more after the contract expires.

In each of these situations, the extended benefit negotiated is either fixed in the existing contract and of limited duration, after which bargaining on the subject may resume, or the amount or cost of the benefit is tied to an objective standard established outside of the bargaining process. These situations, relied upon by the circuit court, App. 8, are simply inapposite to this case. They do not involve a circumstance like this one where the duration,

amount and cost of the benefit which extends into the future is totally dependent on continued collective bargaining. In the former situations, the negotiated obligation has substance without resort to future collective bargaining. By contrast, the obligation imposed in this case has no meaning or substance without future collective bargaining because the level of benefits, what they will cost and whether they will even be provided can only be determined by bargaining. These negotiations will be conducted by BCOA, not Rawl. The Union cannot participate in such bargaining individually with Rawl. Contrary to the circuit court's view, this case presents an unprecedented waiver of the statutory right to bargain.

B. Perpetual Waivers Of Statutory Bargaining Rights Are Contrary To Federal Labor Policy

1. *A Perpetual Waiver Undermines The Collective Bargaining Process*

The circuit court ruled that Rawl surrendered to BCOA its right to bargain over participation in the Funds, and thus, important benefits for Rawl's employees. This forfeiture is perpetual.

This waiver is in stark contrast to virtually every reported case in which a waiver of bargaining rights has been found to have occurred. Waiver cases fall into two categories. In the first category, which includes all but a handful of cases, the party has waived a right, such as the right to strike, for the term of the contract, permitting renewed bargaining on the matter upon contract expiration. In the second category, the parties have agreed upon a fixed benefit or right which extends beyond the term of the contract but is not dependent on additional collective

bargaining to give it substance. Until this case, there have been no reported cases of a perpetual waiver of future bargaining rights. The destructive impact of the circuit court's decision on the collective bargaining process demonstrates why it is unprecedented.

Rawl and other former BCOA companies have now been completely deprived of any ability to bargain over critical and costly employee benefits. Their competitors in BCOA now have that right. It is no different than General Motors and Ford having the right to bargain about benefits for employees of Chrysler. As non-BCOA companies, Rawl and others are powerless to stop BCOA from setting higher contribution rates applicable to non-BCOA members or from negotiating improved benefits only for employees of active BCOA members.[9] Thus, the collective bargaining process has become so convoluted that Rawl's competitors will decide how much of Rawl's money they will spend for benefits for Rawl's employees.

Correspondingly, Rawl's employees may find it more advantageous to lessen their demands for costly pension benefits in exchange for the company's agreement to higher wages, greater job security, improved vacations, holidays or work rules. The circuit court's decision forecloses these trade-offs.

Thus, the circuit court created an entirely new and unworkable concept of collective bargaining. Former Wage Agreement signatories and those who have negotiated contracts with the Union different than the Wage Agreement, now cannot realistically negotiate a labor contract with the Union. While the non-BCOA employer can negotiate with

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[9] BCOA and the union did just that in 1991. JA 194.

the Union over wages and non-economic terms, it has no input whatever into the type and cost of pension benefits for its employees. The Union's dilemma is that, under these circumstances, no rational employer will put his financial cards on the negotiating table. Nor could he -- since an unknown portion of his resources must be held in reserve to pay for unpredictable benefits negotiated by others. Not only will it be impossible for the Union to trade benefits for such things as job security, but the Union will be severely handicapped in its efforts to negotiate a good financial package for its members.

The collective bargaining process endorsed by the circuit court obviously affects an employer's right to participate in contractual and financial decisions which may impact its very survival. The cost of health and pension benefits are well known. The Trustees allege Rawl's liability in this case may be more than $20 million. It is one thing to cede to other employers the right to bargain over such matters for the term of a three-year contract, it is quite another to have unwittingly waived the right to bargain over such matters in perpetuity.

2. *A Perpetual Waiver Undermines The Rights of Rawl's Employees*

Unions are certified to represent an appropriate bargaining unit of employees. One employer may have several functional units of employees represented by the same or different unions. Each unit is entitled to negotiate its own collective bargaining agreement. *Local Union No. 323*, 242 N.L.R.B. 305, 308 (1979). A union representing more than one unit is legally forbidden from conditioning agreement in one unit upon a satisfactory agreement in another unit. *Utility Workers Local 111*, 203 N.L.R.B. 230,

238 (1973), *enforced sub nom. NLRB v. Utility Workers*, 490 F.2d 1383 (6th Cir. 1974). As this Court has observed:

> This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards . . . . But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The Union's obligation to its members would seem best served if the Union retained the ability to respond to each bargaining situation as the individual circumstances might warrant . . . .

UMW v. Pennington, 381 U.S. 657, 666 (1965).

Rawl's employees constitute their own bargaining unit. Employees of BCOA companies comprise, together, another unit. Under the circuit court's ruling, for the Union to agree to a contract with Rawl which includes pension and health fund benefits, it must also reach agreement with BCOA. Agreement in one bargaining unit is thus dependant on agreement in another, a scheme unlawful under the NLRA. *See Utility Workers Local 111*, 203 N.L.R.B. at 238-39.

Rawl's employees would be "best served" if the Union "retain[s] the ability to respond to each bargaining

situation".[7] In this case, however, Rawl's employees will not be entitled to participate in ratifying BCOA's contract which dictates their benefits. Nor could a work stoppage at Rawl bring any economic pressure on BCOA to agree to Union bargaining demands. It is not even clear whether Rawl's employees will ever be represented concerning their pension benefits since, at BCOA's bargaining table, the Union will be representing employees of BCOA member companies.

Rawl and its employees are not alone in this predicament. There are hundreds of companies which have either withdrawn from BCOA or negotiated contracts with the Union which differ from the Wage Agreement concerning participation in the Funds. Under the circuit court's decision, each of these companies and their employees face the same problem as does Rawl.[8]

3. *A Perpetual Waiver Unlawfully Coerces Employees In The Selection Of Their Bargaining Representative*

The circuit court's decision affects the employees' selection of a bargaining representative. The employees of several of Rawl's co-defendants in the district court have decertified the Union.[9] Yet, those companies now remain

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[7] *Pennington*, 381 U.S. at 666.

[8] The Trustess are already pursuing scores of these companies for alleged delinquent contributions based on the evergreen theory endorsed by the lower courts.

[9] These co-defendants, Myers Coal Company and Oak Grove Coal Company, have indicated to Rawl that they intend to file an *amicus* brief in support of Rawl's petition.

bound by the evergreen clause to participate in the Funds and their employees are bound by the result of future Union-BCOA negotiations.

In *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), this Court held that it was illegal for a union to waive any rights of employees which would impair the employees in the selection of their bargaining representative. Contrasting such a waiver with the rules applicable to a waiver of economic rights, this Court, citing the Fifth Circuit, found:

> a different rule should obtain where the rights of employees to exercise their choice of a bargaining representative is involved -- whether to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self interest of its own to serve by perpetuating itself as the bargaining representative.

Id.

In this case the right of employees to choose their bargaining representative has been substantially limited, if not completely waived. If employees wish to decertify the Union and have no bargaining representative, or if they wish to obtain a new one, that new representative cannot bargain realistically over pension issues with the employer. As a result of the circuit court's decision, employees of Rawl's co-defendants are forced into representation concerning their pension benefits by the very union they decertified.

The bargaining structure approved by the circuit court severely undermines the collective bargaining process. In this case it has eliminated the process altogether for Rawl, and many other companies like Rawl, concerning critical components of the employer-employee relationship. The circuit court's decision sets a dangerous precedent for employers and unions alike. It should be reviewed by this Court.

II. A MULTI-EMPLOYER BARGAINING ASSOCIATION SHOULD NOT BE PERMITTED TO WAIVE IN PERPETUITY THE STATUTORY RIGHTS OF ITS MEMBERS

In the circuit court's opinion, BCOA secured for itself the unalterable right to negotiate over Rawl's participation in the Funds and thus, the provision of important benefits for Rawl's employees. Rawl, and many others, effectively have been prevented from withdrawing from BCOA at least with respect to several major, mandatory subjects of bargaining. Rawl's unchallenged and lawful withdrawal from BCOA in 1984 has been retroactively nullified with the added proviso that no such withdrawal may ever be effective.

A. Multi-Employer Bargaining Is A Consensual Process From Which Employers Have The Right To Withdraw

The NLRB and courts have consistently emphasized that multi-employer bargaining associations are purely voluntary organizations. *Charles D. Bonnano Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982); *Retail Assocs., Inc.*, 120 N.L.R.B. 388 (1958). Employers and unions may not be coerced into participating in or remaining a part of

multi-employer bargaining. *Id.*; *see also Evening News Ass'n, Inc.*, 154 N.L.R.B. 1494, 1496-97 (1965), *enforced sub nom. Detroit Newspaper Publisher's Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967).

Once an employer chooses to participate in multi-employer bargaining he must abide by the contract negotiated. So long as the majority of members approve the contract, the dissatisfied employer is bound by the agreement even if he disagrees with the bargain made or voted against its ratification. *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 295-96 (9th Cir. 1987).[10]

Though bound by the first contract, the dissatisfied multi-employer member has always been able to withdraw from the association before a second contract is negotiated. Upon withdrawal the employer and union are obligated to bargain individually for a contract covering the employer's employees. *Tahoe Nugget, Inc.*, 227 N.L.R.B. 357, *enforced*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). The right to withdraw has been uniformly guaranteed by the NLRB and this Court since the conception of multi-employer bargaining. The law "neither forces employers into multi-employer units nor erects barriers to withdrawal prior to bargaining." *Bonanno Linnen*, 454 U.S. at 412. Thus, the circuit court's decision effectively preventing Rawl from withdrawing bargaining authority from

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[10] *See also NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 58 (10th Cir. 1966); *McAx Sign Co. v. NLRB*, 576 F.2d 62, 67-68 (5th Cir. 1978). In *Leapley Co.*, 278 N.L.R.B. 981, 984 (1986), the NLRB ruled that an employer could not avoid a contract negotiated by the multi-employer group of which it was a part simply because it "did not at any time participate in the negotiations."

BCOA contradicts well established principles of labor law.[11/]

The result of the circuit court's holding is that, once Rawl and others allowed BCOA to bargain on their behalf in 1978, they yielded their bargaining rights to BCOA forever. That analysis ignores the right of the companies to withdraw from BCOA and their right to negotiate their own labor contracts with the Union. As we have shown, the circuit court's implication that Rawl had a choice to "sign on" to the Wage Agreement, App. 17, misapprehends the nature of multi-employer bargaining. In a multi-employer bargaining context, it is not a matter of "signing on" to a contract once it is negotiated. By joining the association before negotiations commence, employers agree to be bound by the contract even before it is negotiated.

B. Authorizing A Multi-Employer Association To Waive In Perpetuity The Statutory Rights Of Its Members Undermines Federal Labor Policy

By permitting BCOA to waive Rawl's rights in perpetuity, the circuit court ignored and then restructured the basic tenets of multi-employer bargaining. The NLRB and the Second and Sixth Circuits have warned that this restructuring may lead to the demise of multi-employer bargaining. *Evening News Ass'n*, 154 N.L.R.B. at 1499,

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11/ The circuit court also failed to grasp that the statutory right to bargain is Rawl's right to yield, not the right of an association to yield on its behalf. There is no dispute that Rawl was never told of an evergreen commitment before or after ratification of the 1978 Wage Agreement. Thus, individually, Rawl did not "consciously" waive any right. *American Distrib. Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

enforced, 372 F.2d at 572 (6th Cir.); *Publisher's Ass'n of N.Y. v. NLRB*, 364 F.2d 293, 295 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966).

Multi-employer bargaining is a common and efficient method of collective bargaining. It has dominated the coal, trucking, railroad, electrical, plumbing, construction, and hotel industries. Unions adhere to the process because it enables them to negotiate uniform industry standards. Employers participate because it is efficient and allows some certainty that labor costs will be relatively equal between competitors. However, "[u]nions, like employers, would understandably be reluctant to initiate multi-employer bargaining if the decision to do so were virtually irrevocable." *Evening News Ass'n*, 154 N.L.R.B. at 1499.

Recognizing their right to withdraw from multi-employer bargaining units, employers agree to cede their individual bargaining rights to the multi-employer group on a contract by contract basis. They do not cede those rights beyond the term of the contract negotiated. Yet, the circuit court decided that Rawl extended its "power of attorney" to BCOA, beyond the term of the 1978 and 1981 Wage Agreement, into the indefinite future.

Rawl authorized BCOA to negotiate a labor contract. It did not authorize or empower BCOA to forfeit in perpetuity either Rawl's individual statutory right to bargain with the Union or its right to withdraw from BCOA prior to negotiation of the 1984 Wage Agreement. Again, if multi-employer associations could permanently waive the statutory rights of their individual members to withdraw and bargain separately, no employer would ever join.

Allowing a multi-employer bargaining association to waive the statutory rights of its members also implicates provisions of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) (1987). An employer may not be coerced in the selection of its bargaining representative and, specifically, may not be coerced into joining or remaining a member of a multi-employer group against its will.[12] In this case, BCOA remains Rawl's collective bargaining representative despite Rawl's lawful withdrawal from BCOA in 1984. The circuit court's ruling mandates that BCOA will retain this status indefinitely. Just as a union cannot coerce an employer in the selection of its bargaining representative, a multi-employer association should not be permitted to coerce its members into remaining part of the group against their will.[13]

The collective bargaining structure fashioned by the circuit cuts deeply into the rights of individual members of multi-employer associations. Smaller members of large associations, similar to Rawl's status relative to BCOA, will not join such groups for fear of losing their bargaining autonomy forever. This Court should review this question to clarify whether a multi-employer association may waive the statutory rights of its members in perpetuity or waive such rights without their knowledge or consent.

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[12] *Bonnano Linen*, 454 U.S. at 412; *International Union of Elec., Radio & Mach. Workers v. NLRB*, 604 F.2d 689, 695 n.14 (D.C. Cir. 1979); *NLRB v. Sklar*, 316 F.2d 145, 150 (6th Cir. 1963); *Retail Assocs., Inc.*, 120 N.L.R.B. 388 (1958); *see also* Patrick Hardin, *The Developing Labor Law*, 508-522 (1992) and the cases cited therein.

[13] The majority of unionized companies in the coal industry never join BCOA. They sign the Wage Agreement on a "me too" basis. BCOA is now their bargaining representative as well.

III. EVEN IF PERPETUAL WAIVERS ARE PERMISSIBLE, THE REFUSAL OF THE DISTRICT OF COLUMBIA CIRCUIT TO APPLY THE CLEAR AND UNMISTAKABLE STANDARD CONFLICTS WITH DECISIONS OF THIS COURT AND THE MAJORITY OF CIRCUITS

A. The Judicial Standards Applicable To Waivers

National labor policy disfavors waivers of statutory rights. *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). This Court has held that a waiver in a collective bargaining agreement must be "explicitly stated" or more succinctly be "clear and unmistakable." *Metropolitan Edison*, 460 U.S. at 708 & n.12. "Equivocal, ambiguous language in a bargaining agreement is insufficient to demonstrate waiver." *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585, 588 (6th Cir. 1986).

In interpreting and explaining this Court's waiver doctrine, the circuit courts have determined that "waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Chesapeake & Potomac Tel.*, 687 F.2d at 636. A wary eye is cast towards implied waivers. *NLRB v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991). Consequently, for a party to waive a statutorily protected right during bargaining, the majority of the circuits have held that courts must find the subject was "fully discussed" or "consciously explored" and the party "consciously yielded" its position on the matter. *American Distrib. Co. v. NLRB*, 715 F.2d at 450.

B. The Conflict In The Circuits

Every circuit, except the District of Columbia and Seventh circuits, continues to adhere to the "clear and unmistakable" standard set forth in *Metropolitan Edison*. *See Communication Workers v. NLRB*, 644 F.2d 923, 927 (1st Cir. 1981); *Chesapeake & Potomac Tel.*, 687 F.2d at 636 (2d Cir.); *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983); *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247, 256 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981); *United Bhd. of Carpenters & Joiners Local 2848 v. NLRB*, 891 F.2d 1160, 1163-64 (5th Cir. 1990); *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 232-33 (6th Cir. 1988); *Hansen v. Guyette*, 814 F.2d 547, 551 (8th Cir. 1987); *American Distrib. Co.*, 715 F.2d at 449-50 (9th Cir.); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993). Likewise, the National Labor Relations Board consistently applies the "clear and unmistakable" waiver analysis. *American Broadcasting Co.*, 290 N.L.R.B. 86 (1988); *American Diamond Tool, Inc.*, 306 N.L.R.B. No. 108 (1992).

The D.C. Circuit Court rejected Rawl's attempt to apply the waiver doctrine and as a result, rejected the doctrine outright. The circuit court's decision transforms waiver analysis into simple contract interpretation. Any item which could be construed to be covered by the contract is subject to contract analysis, even if that term of the contract amounts to a waiver of statutory rights.

This form of analysis is not confined to the D.C. Circuit. The Seventh Circuit has also indicated that courts should favor standard contract analysis over the clear and unmistakable standard. *See Chicago Tribune Co. v. NLRB*,

974 F.2d 933, 936-37 (7th Cir. 1992), *enforcing in part and denying enforcement in part,* 304 N.L.R.B. No. 62 (1991). Indeed, the Seventh Circuit goes so far as to question whether the "clear and unmistakable" test retains viability. 974 F.2d at 937. In *Chicago Tribune*, the issue was whether a management rights clause in a labor contract allowed an employer to establish a drug testing program without bargaining with the Union. The Seventh Circuit, overruling the NLRB, concluded that it was faced with a question of contract interpretation, not waiver. *Id.* at 937. Consequently, the court dismissed the "clear and unmistakable test" finding that "a doctrine that tilts decision in the Union's favor" should be avoided. *Id.*

By contrast, the Sixth Circuit has employed this Courts' waiver analysis to facts similar to those of this case. In *General Tire*, *supra*, an employer unilaterally ceased pension payments 90 days after the termination of the agreement. The collective bargaining agreement provided, "[n]otwithstanding the termination of the Agreement, . . . the [pension] benefits described herein shall be provided for ninety (90) days following termination." *Id.* at 588. When the Company terminated the benefits after 90 days, the Union filed unfair labor practice charges alleging it had not waived its right to bargain over the provision of benefits after the 90 day period. *Id.* at 587. Applying *Metropolitan Edison*, the NLRB agreed with the Union.

On appeal, the Sixth Circuit also agreed that the employer had a statutory duty to bargain before ceasing contributions. In finding that the Union did not waive this right to bargain, the court wrote:

> [W]aiver of a collective bargaining right may only be established by 'clear and

> unmistakable' evidence that the party intentionally yielded its right. Equivocal, ambiguous language in a bargaining agreement is insufficient to demonstrate waiver.

Id. (citations omitted).

Rawl submits the *General Tire* case would have been decided differently under the analysis used by the D.C. Circuit in the Rawl case. *General Tire* and *Chicago Tribune* are classic waiver cases. In both, the employer acted unilaterally to affect a mandatory term and condition of employment. The circuits applied different standards to reach different results. Rawl's is a more compelling case of waiver than either one. No matter the outcome or standards applied in *General Tire* and *Chicago Tribune*, the affected union will have the right to re-bargain the drug testing program or the provision of pension benefits in a new collective bargaining agreement. Rawl has no such right.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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May 7, 1993

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 17, 1992 Decided February 2, 1993

No. 92-7141

UNITED MINE WORKERS OF AMERICA 1974 PENSION, *ET AL.*,

v.

PITTSTON COMPANY, *ET AL.*,

APPELLANTS

No. 92-7142

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST

v.

RAWL SALES & PROCESSING CO.,

APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 88cv00969 and 91cv03241)

John M. Wood and *Gregory B. Robertson*, with whom *Kathleen H. McGuan*, *Bruin S. Richardson*, and *Forrest H. Roles* were on the joint brief, for appellants. *Susan F. Wiltsie* also entered an appearance for appellants.

Julia P. Clark, with whom *Jeremiah A. Collins*, and *David Allen* were on the brief, for appellees.

Peter Buscemi, with whom *Robert A. Dufek*, *Stanley F. Lechner* and *Thomas J. O'Brien* were on the brief for *amicus curiae* Bituminous Coal Operators' Association, Inc.

Jonathan D. Schiller and *Robert C. Bell, Jr.* was on the brief, for *amicus curiae* Island Creek Corp., Drummond Company, Inc., Clemens Coal Co., Dunkard Mining Company, Kenellis Energies, Inc., and Penn Allegh Coal Company.

Francis T. Coleman, *Mary Lou Smith* was on the brief, for *amicus curiaes* Agipcoal USA, Inc., Aloe Coal Company, Beilchick Brothers, Bently Coal Company, Inc., Canterbury Coal Company, Tanowia Mining Company, Inc., Myers Coal Company, Oak Grove Coal Company and Valley Coal Company. *David Laurent* also entered an appearance for *amicus curiae*.

Before: EDWARDS, BUCKLEY and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This appeal presents issues that have been certified by the District Court for interlocutory review pursuant to 28 U.S.C. § 1292(b). The action before us involves a suit brought by the Trustees (the "Trustees") of certain United Mine Workers of America ("UMWA") pension trusts to require pension fund contributions from several coal companies (the "Coal Companies"). The District Court granted summary judgment in favor of the Trustees on the issue of liability, *see In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. 658 (D.D.C. 1992) ("*In re UMWA* "),

and then, on request of the Coal Companies, certified the matter for interlocutory review.

The parties do not dispute and we agree that the case is properly before this court under 28 U.S.C. § 1292(b). Finding no error in the judgment of the trial court, we affirm and remand for further proceedings.

I. Introduction

The underlying facts, including the history of this litigation, are recited in the opinion of the District Court. *See In re UMWA*, 782 F. Supp. at 660–62. We will not repeat this background, save as necessary to highlight matters of significance for this appeal.

Briefly, this case involves the interpretation of the so-called "evergreen clause" [1] in the pension trust and collective bargaining agreements between the UMWA and the Coal Companies' bargaining representative, the Bituminous Coal Operators' Association ("BCOA"). The evergreen clause was first added to the trust agreements in 1978, and it was incorporated by reference into article XX(d) of the 1978 "National Bituminous Coal Wage Agreement" ("NBCWA"), and in all subsequent collective bargaining agreements between the parties. The clause provided that participating employers (including the appellants) were bound to make continuing

[1] The evergreen clause in the 1981 trust, reprinted in Joint Appendix ("J.A.") at 967, is exemplary and reads in full:

> Any Employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1950 Pension Plan, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 Pension Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Pension Plan and Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to, the National Bituminous Coal Wage Agreement of 1981.

contributions to the trusts, and that the amounts of contribution would be as specified in future NBCWAs.

The dispute in this case arose upon the expiration of the NBCWAs to which the appellant Coal Companies were signatories.[2] Instead of entering into successor NBCWAs, the Coal Companies withdrew from the BCOA and negotiated individual labor agreements with the UMWA which included modifications of their contribution obligations to the trusts. The Trustees then brought this suit, contending that the evergreen clause obligates the Coal Companies to continue contributing to the trusts at the levels established in successor NBCWAs.[3]

On cross-motions for summary judgment, the Trustees submitted declarations from witnesses who participated in the 1978 negotiations, along with corroborating documents generated shortly after those negotiations. In response, the Coal Companies argued that it was noteworthy that the Trustees never previously had sought to enforce a claim premised on "perpetual obligations" under the evergreen clause; rather, according to the Coal Companies, the Trustees always had defined claims against other allegedly defaulting employers

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[2] The defendants that now comprise the Rawl Companies ("Rawl") were signatory to either the 1978 or 1981 NBCWA or "me too" contracts identical thereto. The defendant PCG Companies ("PCG") were signatory to the 1978, 1981 and 1984 NBCWAs. It is undisputed that the NBCWAs to which the Coal Companies agreed have now expired.

[3] The Trustees' "perpetual obligation" interpretation was advanced in a different context in *Connors v. Link Coal Co.*, 970 F.2d 902 (D.C. Cir. 1992). In *Link Coal*, a trust not a party to this action sued several employers who had negotiated a reduced contribution rate during the term of the 1984 NBCWA. The District Court in *Link Coal* rejected the perpetual obligations theory as a matter of law and granted summary judgment to the employers. *Id.* at 903. This Court reversed, holding that "it is clear that the evergreen clause is, at the very least, susceptible to the Trustees' interpretation." *Id.* at 907. Thus, although we held that the Coal Companies' position was not dictated as a matter of law, we did not finally determine the meaning of the evergreen clause.

solely pursuant to "withdrawal liability".[4] After considering the language of the relevant trust and collective bargaining agreements, as well as the interpretive evidence before it, the District Court upheld the Trustees' interpretation of the evergreen clause and granted their motion for summary judgment on the question of liability. *In re UMWA*, 782 F. Supp. at 667.

Defendant Rawl moved the District Court to reconsider its decision and defendant PCG moved for amendment of the District Court's order to satisfy the conditions for interlocutory appeal under 28 U.S.C. § 1292(b). In conjunction with its motion, Rawl submitted new evidence to the District Court; this evidence consisted of declarations of persons familiar with the 1978 negotiations who denied that the evergreen clause was understood to create ongoing obligations. In addition, Rawl argued that it had been unfairly denied adequate discovery and that it had several affirmative defenses that should have survived the summary judgment order.

The District Court refused to consider the "new evidence" offered by Rawl, and it denied the motion for reconsideration. *UMWA 1974 Pension Trust v. Pittston Co.*, No. 88–969, mem. op. at 13–17 (D.D.C. Apr. 29, 1992). In disposing of the issues raised by Rawl, the District Court held that Rawl had not been unfairly denied an opportunity to conduct discovery, because there had been no agreement restricting the use of extrinsic evidence and because Rawl had not asked for leave of the court to conduct discovery after the Trustees' summary judgment motion was filed. *Id.* at 4–6. In addition, the

[4] Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1988), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381 *et seq.* (1988), the trustees of multiemployer pension funds may collect "withdrawal liability" from employers who withdraw from the fund. Withdrawal liability typically involves a one-time payment that represents the withdrawing employer's proportionate share of the trust's vested liability that is unfunded in order to prevent a later shortfall.

District Court concluded that Rawl had waived any affirmative defenses "by not asserting them in its own motion for summary judgment and, more importantly, by not asserting them in its opposition to the Trusts' motion for summary judgment." *Id.* at 12. The District Court did, however, grant an amendment of its order to certify the case for interlocutory appeal. *Id.* at 21.

II. The Construction of the Evergreen Clause

The Coal Companies claim that the District Court erred as a matter of law in construing the evergreen clause. We disagree. The District Court, relying on the words of the agreements and the extrinsic evidence properly before it, concluded that the only reasonable interpretation of the evergreen clause is one premised on a principle of "perpetual obligation." Accordingly, the District Court granted summary judgment for the Trustees. We have reviewed this judgment *de novo*, *Shields v. Eli Lilly & Co.*, 895 F.2d 1463, 1466 (D.C. Cir. 1990), and, pursuant to this review, we agree with the conclusion reached by the District Court.

In cases requiring the court to construe the meaning of a contract, the dispute may be resolved as a matter of law if the contested agreement admits of only one reasonable interpretation. *Link Coal Co.*, 970 F.2d at 904. Moreover, in divining the meaning of contract terms, the court is not limited to the four corners of the agreement: the party moving for summary judgment may submit affidavits and other extrinsic evidence that gives color to the words of the agreement or otherwise reveals the intent of the contracting parties at the time of the agreement. *See* Fed. R. Civ. P. 56(e); *see also Link Coal*, 970 F.2d at 904–905 (extrinsic evidence considered to determine the meaning of the evergreen clause). If the moving party demonstrates that no material factual issue remains, the burden then shifts to the non-moving party to produce specific evidence that sufficiently contradicts or undermines the movant's case to demonstrate a material factual dispute. *Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558, 1561 (D.C. Cir.), *cert. denied*, 111 S. Ct. 387 (1990). In order to

carry this burden and avoid summary judgment, the evidence submitted by the non-moving party must show that more than one *reasonable* interpretation exists. *Farmland Indus., Inc. v. Grain Bd. of Iraq*, 904 F.2d 732, 736 (D.C. Cir. 1990).

Applying this analytical framework to the contract provisions at hand, we conclude that the District Court was fully justified in granting summary judgment in favor of the Trustees. The language of the relevant provisions in the applicable trust and collective bargaining agreements unambiguously obliges signatory employers to contribute to the trusts at the rates specified in the current NBCWA, irrespective of the employer's failure sign that NBCWA. The evergreen clause in the trust documents clearly does not include a durational limitation to the employer's duty to contribute to the trusts. *See* note 1, *supra*. Although the clause does allow for modifications in "successor agreements," the structure of the clause and the reference to the current NBCWA, through the use of "thereto," indicate that only a subsequent NBCWA can qualify as such a successor agreement. Furthermore, section XX(d) [5] of the NBCWAs, which incorporates the evergreen clause by reference, comprehends only the termination of the particular NBCWA and the contribution rates specified therein; it does not, contrary to the Coal Companies' protestations, provide for the general termination of the *duty to contribute* to the trusts. Thus, by accepting the terms of section XX(d),

[5] Section XX(d) of the 1981 NBCWA, reprinted in J.A. at 971, is typical and contains the following language:

> During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below....
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> ....
>
> (i) Into the 1950 Pension Trust: for the period beginning June 7, 1981, and ending June 6, 1982, 95.0 per ton on each such ton; for the period beginning June 7, 1982, and ending June 6, 1983, $1.11 per ton on each such ton; and for the period beginning June 7, 1983, and ending when this agreement is terminated, $1.11 per ton on each such ton....

these employers agreed to be bound by the evergreen clause to make continuing contributions to the trusts; and this obligation included an agreement to make contributions at rates specified in subsequent NBCWAs, without regard to whether the employer was still a party to the subsequent agreements. The Coal Companies cannot now rely on their refusal to sign successor NBCWAs to release them from a previously agreed-upon perpetual obligation.[6]

This plain construction of the evergreen clause is corroborated by voluminous extrinsic evidence submitted by the Trustees. First, the Trustees submitted the sworn declarations of five people who were directly involved in the negotiations that led to the inclusion of the evergreen clause in the 1978 trust documents.[7] In addition, the Trustees submitted copies of notes and minutes prepared contemporaneously with those negotiations which indicate an intention to create a continuing obligation, *see, e.g.*, BCOA Proposals (Jan. 23, 1978), *reprinted in* J.A. at 689 (protection for BCOA against

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[6] We have no reason to question the propriety of an employer agreeing to be bound to contractual duties beyond the life of a specific collective bargaining agreement. *See Litton Fin. Printing Div. v. NLRB*, 111 S. Ct. 2215, 2226 (1991) (disputes regarding benefits that are to continue after collective bargaining agreement's expiration are deemed to arise under the agreement); *see also United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1504–05 (11th Cir. 1988) (employer contracted to provide insurance benefits beyond expiration of collective bargaining agreement), *cert. denied*, 489 U.S. 1096 (1989).

[7] *See* Declaration of Donald E. Pierce, Jr., Consultant to the UMWA members of the Benefits Subcommittee of the 1978 negotiations (Feb. 27, 1991), *reprinted in* J.A. at 563; Declaration of B.M. Shaner, Benefits Subcommittee member during the 1978 negotiations (Mar. 4, 1991), *reprinted in* J.A. at 587; Declaration of David W. Kempken, Benefits Subcommittee member during the 1978 negotiations (Mar. 5, 1991), *reprinted in* J.A. at 596; Declaration of K. L. Young, Benefits Subcommittee member during the 1978 negotiations (Mar. 5, 1991), *reprinted in* J.A. at 619; Declaration of Roger M. Haynes, Chairman of the Benefits Subcommittee for the 1978 negotiations (Mar. 7, 1991), *reprinted in* J.A. at 639.

withdrawals from trusts), and various BCOA and UMWA documents prepared shortly after the negotiations were concluded, *see, e.g.*, Memorandum of B.M. Shaner, Manager of Employee Benefits for Bethlehem Steel Corporation, to John O'Connell, Vice President for Labor Relations, Bethlehem Steel Corporation (May 23, 1978), *reprinted in* J.A. at 594–95 (evergreen clause structured to prevent withdrawals from the funds). Finally, the District Court was provided with public statements made by negotiators of the evergreen clause which confirmed the Trustees' posited interpretation. *See, e.g., Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Subcomm. on Labor–Management Relations of the House Comm. on Educ. and Labor*, 96th Cong., 1st Sess. 418 (1979) (statement of Donald Pierce, economist, UMWA). Thus, not only is the language of the evergreen clause clear in its effect of permanently binding signatory employers to the contribution rates established in current NBCWAs, but it appears that negotiators on *both* sides of the bargaining table at the 1978 negotiations understood the import of that language.

Confronted with this well supported motion for summary judgment, the Coal Companies were able to respond only with a counter-intuitive reading of the pertinent language and references to the Trustees' failure to previously enforce the perpetual obligations explicit in the contract provisions. The Coal Companies' first argument—that section XX(d) of the NBCWAs provides for the termination of the contribution obligation at the expiration of the agreement—is directly at odds with the language of that section. Section XX(d) plainly does not purport to define the durational limits of the contribution requirement, but instead details the amounts due to be paid during specified periods by employers already bound to contribute. *See* note 5, *supra*. Similarly unconvincing is the Coal Companies' argument that the evergreen clause allows for the modification of contribution requirements in non-NBCWA labor agreements. As mentioned above, the phrase allowing for modifications in successor agreements clearly refers to the prior NBCWA, leading us to the natural inference that the only "successor" agreement to an NBCWA is

another NBCWA. Hence, we are not persuaded that the plain language of the relevant provisions accommodates the Coal Companies' interpretation.[8]

Moreover, the Coal Companies provided no extrinsic evidence to substantiate the reasonableness of their interpretation. While the case was being considered on summary judgment, the Coal Companies relied almost exclusively on the Trustees' supposed inconsistent conduct in an attempt to demonstrate that the Trustees have only recently invented the perpetual obligations interpretation of the evergreen clause. This conduct was comprised primarily of the Trustees' use of withdrawal liability rather than suits under the evergreen clause in several earlier instances in which signatory employers failed to contribute to the funds at the rates specified in the NBCWA. *See, e.g., Connors v. Peles*, 724 F. Supp. 1538 (W.D. Pa. 1989); *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986). However, in the cases cited to us, it appears that the companies upon whom the Trustees sought to impose withdrawal liability all were having financial problems.[9] Thus, it is hardly surprising that the Trustees

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[8] The Coal Companies also make a contextual argument based on changes made to the 1988 NBCWA, *reprinted in* J.A. at 998, that provide for withdrawal liability in the event that an employer ceases to be obligated to contribute to the trusts. This argument, too, is flawed. First, the language in the 1988 NBCWA creating withdrawal liability only applies if the employer is not otherwise obligated to contribute to the funds (*e.g.*, no new NBCWA is enacted); it does not imply that the drafters of the 1988 agreement understood that employers have the right to terminate their obligations. More fundamentally, the understanding of the drafters of the 1988 NBCWA is immaterial for the purpose of divining the intent of the drafters of the 1978 NBCWA.

[9] For instance, in *Peles*, the Trustees filed suit against Pelbro Fuel in 1983 for withdrawal liability, *Combs v. Pelbro Fuel, Inc.*, No. 88–1524 (D.D.C. May 27, 1983), and the company was out of business by 1985, *Peles*, 724 F. Supp. at 1542. Likewise, in *B & W Coal Co.*, the court found that the company had withdrawn from the funds in March of 1981, *B & W Coal Co.*, 646 F. Supp. at 167, only

invoked the withdrawal liability rules to garner one-time payments rather than rely upon the evergreen clause to secure a continuing contribution obligation from entities that were seen heading toward demise. Indeed, since the legal basis for withdrawal liability does not turn upon the contractual provisions at issue in this case, the Trustees have never taken a contrary position on the meaning of the evergreen clause itself.[10] We will not infer that the Trustees previously had a different interpretation of the clause simply because they made a rational business decision to sue under an alternative theory when certain employers failed to pay into the funds.

In sum, the Trustees provided the District Court with a compelling argument and specific evidence indicating that theirs was the only reasonable interpretation of the evergreen clause and that no material factual dispute remained for trial. The Coal Companies responded with an untenable reading of the contractual language and general evidence that the Trustees' interpretation of the evergreen clause is of recent origins. This evidence falls far short of what is necessary to undermine or contradict the Trustees' evidence. *See, e.g., Bias*, 905 F.2d at 1561 (general evidence that decedent was not the type of person to use cocaine insufficient to contradict specific testimony of persons who had used drugs with decedent). Thus, we affirm the District Court's award of summary judgment to the Trustees.

III. Rawl's Motion for Reconsideration

For many of the same reasons already mentioned, we find no basis upon which to reverse the District Court's refusal to reconsider its decision in light of the alleged "new evidence" belatedly produced by Rawl. Under the Federal Rules of Civil

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four months prior to the company's ultimate failure in July, *see* Joint Brief for Appellants at 11.

[10] Since the evergreen clause was not litigated in the withdrawal liability cases, it appears that no court has ever concluded that the evergreen clause does not require continuing contributions by signatory employers.

*Procedure, a District Court may reconsider its final judg*ments based on newly discovered evidence if that evidence was unavailable at the time of the judgment. *See* FED. R. CIV. P. 60(b)(2) (due diligence required); *see also Stoller v. Marsh*, 682 F.2d 971, 981 (D.C. Cir. 1982) (newly discovered evidence submitted with a 60(b) motion only considered if it was unavailable before summary judgment), *cert. denied*, 460 U.S. 1037 (1983). Moreover, the decision to grant or deny a rule 60(b) motion is committed to the discretion of the District Court and, unless the decision is "rooted in an error of law," should only be reversed if it constitutes an abuse of discretion. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988).

Here, it is undisputed that most, if not all, of the information that Rawl belatedly sought to submit with its motion for reconsideration was available before the District Court ruled on summary judgment. Rawl maintains, however, that the parties agreed in an earlier phase of the litigation [11] to forego discovery because the court could decide the case without considering extrinsic evidence, and that the court had entered

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[11] The Trustees originally sued Rawl in the United States District Court for the Southern District of West Virginia. *See UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90–0890 (S.D. W. Va. filed Sept. 19, 1990). In that suit, the parties filed cross-motions for summary judgment. The District Court, with the agreement of the parties, entered an order staying discovery pending disposition of the summary judgment motions, unless the parties agreed to conduct discovery or unless the court granted permission to conduct discovery for good cause shown. *See UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90–0890 (S.D. W. Va. Jan. 24, 1991) (order suspending time frame order pending decision on summary judgment). Prior to ruling on the motions for summary judgment, the case was transferred by the Judicial Panel on Multidistrict Litigation to the District of Columbia where it was consolidated with the PCG cases. *See In re UMWA Employee Benefit Plans Litigation*, No. 886 (J.P.M.L. Dec. 12, 1991) (transfer order). In this District, Rawl filed a motion for oral argument on its pending motion for summary judgment, but did not move for additional discovery. *See* Memorandum in Support of Rawl's Motion for Oral Argument (Jan. 2, 1992), *reprinted in* J.A. at 302.

an order reflecting that agreement. Upon reviewing both the order staying discovery and the transcript of the scheduling conference that led to that order, we find no indication that the court precluded the consideration of extrinsic evidence in ruling on the summary judgment motions. *See UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90–0890 (S.D. W. Va. Jan. 24, 1991) (order suspending time frame order pending decision on summary judgment); *UMWA 1974 Pension Trust v. Rawl Sales & Processing Co.*, No. 3:90–0890 (S.D. W. Va. Jan. 14, 1991) (transcript of scheduling conference). Indeed, Rawl's putative reliance on such an agreement is belied by its own submissions of extrinsic evidence in support of its cross-motion for summary judgment. Thus, it does not appear that Rawl was in any way misled about the scope of the District Court's inquiry in disposing of this case on summary judgment.

Furthermore, Rawl has failed to demonstrate that it was prejudiced by the supposed lack of discovery. Rawl rested its motion for reconsideration primarily on affidavits from individuals involved in the 1978 negotiations who averred that they were not aware of the continuing obligation aspect of the evergreen clause at that time. *See, e.g.*, Affidavit of E. Morgan Massey, Director of the BCOA in 1978 (Feb. 13, 1992), *reprinted in* J.A. at 838. In addition, Rawl submitted a document created by the Trustees which allegedly evidenced the Trustees' policy of pursuing withdrawal liability rather than continuing contributions under the evergreen clause. *See* Minutes of the 281st Meeting of the UMWA Board of Trustees (Aug. 26, 1981), *reprinted in* J.A. at 1069. Rawl frankly admits that it could have obtained most of this material prior to the District Court's summary judgment ruling. *See* Rawl Brief at 14. Thus, Rawl's objection to the lack of discovery rings hollow.

In any event, even if we were to consider the material belatedly offered by Rawl, we would still conclude that the District Court did not abuse its discretion by refusing to reconsider its judgment. A party opposing summary judgment, when faced with specific evidence that demonstrates the absence of a material factual dispute, cannot defeat the

motion simply by offering general denials. *See Bias*, 905 F.2d at 1561. Here, none of the affidavits or declarations submitted in conjunction with the motion for reconsideration were of persons who negotiated or drafted the evergreen clause. Rawl's evidence merely abjured the Trustees' allegations—it did not contradict the first-hand accounts of the evergreen clause negotiations offered by the Trustees. Therefore, it was not an abuse of discretion for the District Court to conclude that Rawl's new information failed to demonstrate the existence of a material factual dispute.

IV. Subsidiary Issues

We briefly address the remaining claims by the Coal Companies only to reaffirm the law of this Circuit.

A. *Judicial Estoppel*

The Coal Companies maintain that judicial estoppel should bar the Trustees from asserting their present interpretation of the evergreen clause because of the tension between it and their litigating position in the withdrawal liability cases. However, we have not previously embraced the doctrine of judicial estoppel in this circuit [12] and we decline to do so in this case. In the circuits that recognize the doctrine, judicial estoppel is used to preclude a party from taking a position that is inconsistent with one successfully asserted by the same party in a prior proceeding. *See, e.g., Astor Chauffeured Limousine Co. v. Runnfeldt Invest. Corp.*, 910 F.2d 1540, 1547–48 (7th Cir. 1990); *see also American Methyl Corp. v. EPA*, 749 F.2d 826, 833 n.44 (D.C. Cir. 1984) (where recognized, judicial estoppel limited "to cases in which a party

[12] *See Konstantinidis v. Chen*, 626 F.2d 933, 936–38 (D.C. Cir. 1980). In *Konstantinidis*, we explained that judicial estoppel is designed to preserve the integrity of the judicial system and the sanctity of sworn statements. *Id.* at 937. However, far from endorsing judicial estoppel as the most appropriate means of effectuating that policy, we expressed a preference for the "determination of cases on the basis of the true facts as they might be established ultimately." *Id.* at 938.

prevails on a claim in one court and proceeds in a calculated manner to manipulate a second court by asserting facts at odds with those advanced before the first court"). Since the present case involves wholly distinct issues and facts from those of the withdrawal liability cases, the Trustees have not been required to contradict earlier sworn statements or present conflicting interpretations of the evergreen clause to successive tribunals. Furthermore, there is no indication that the Trustees have deliberately set out to manipulate the system or to unfairly burden the Coal Companies with compound judgments. *Cf. Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992) (judicial estoppel prevents a party from using inconsistent positions to win two judgments arising from the same claim). In this case the Trustees have simply asserted alternative grounds for recovery against different litigants based on different sets of facts. Hence, even if we were to recognize judicial estoppel in this circuit, this case does not present a scenario that would lead us to seriously consider its application.

B. *Issue Preclusion*

The Coal Companies also argue that the Trustees' claims are barred by issue preclusion resulting from the disposition of the withdrawal liability cases. Issue preclusion prohibits a party from relitigating an issue in a subsequent proceeding if the issue was actually litigated in an earlier proceeding and determined by a court of competent jurisdiction, and if the preclusion would not be unfair to the precluded party. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992). In the present suit, the prerequisites for issue preclusion are clearly not satisfied by the Trustees' litigation of the withdrawal liability cases. As we noted above, the issue in the withdrawal liability cases was not the same as that in this case. Consequently, the meaning of the evergreen clause has never before been litigated to a final conclusion and, hence, there is no basis to hold the issue precluded in the present case.

C. *Rawl's Waiver of Defenses*

Rawl next complains of the District Court's holding that Rawl waived several affirmative defenses by not raising them in opposition to the Trustees' motion for summary judgment. *See UMWA 1974 Pension Trust v. Pittston Co.*, No. 88–969, mem. op. at 11 (D.D.C. Apr. 29, 1992). First, Rawl argues that it should not be deemed to have waived a defense based upon the statute of limitations since it had no opportunity to raise this argument after the case was transferred to this District Court and prior to the summary judgment ruling. However, as noted above, Rawl did file a motion prior to the summary judgment order. Since disposition on summary judgment would resolve the case as a matter of law, Rawl naturally should have briefed dispositive legal defenses like the running of the limitations period. Instead, Rawl merely asserted that it had certain defenses, one of which was based on the statute of limitations, that were not applicable to the other defendants. *See* Memorandum in Support of Rawl's Motion for Oral Argument, *reprinted in* J.A. at 306. In support of its motion, Rawl explained that, "these additional defenses are laid out in detail in Rawl's briefs . . . that were filed in the United States District Court for the Southern District of West Virginia in 1991." *Id.* Yet, because the running of the limitations period was plainly not an issue under West Virginia law, the briefs filed in that court make no mention of the defense. Thus, the failure to brief the limitations defense before summary judgment in this District was the result of Rawls' omission, not lack of opportunity.

In addition, Rawl argues that it did not raise other affirmative defenses at the summary judgment stage because those defenses required discovery to develop. As a general rule, though, the failure to raise an affirmative defense in opposition to a motion for summary judgment constitutes an abandonment of the defense. *See, e.g., Attorney General of United States v. Irish People, Inc.*, 595 F. Supp. 114, 120 n.9 (D.D.C. 1984) (affirmative defenses abandoned when not raised at summary judgment stage), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C. Cir. 1986); *Pantry Inc. v. Stop–N–Go Foods, Inc.*, 796 F. Supp. 1164, 1167–68

(S.D. Ind. 1992) ("[t]his Court knows of no authority for holding that affirmative defenses are somehow latent and survive a partial summary judgment to be argued at trial—even though the complete issue of liability has been determined."). Thus, we affirm the District Court's holding that Rawl abandoned its affirmative defenses by not raising them prior to summary judgment.

D. *Waiver of Bargaining Rights*

Finally, the Coal Companies argue that the Trustees' interpretation of the evergreen clause cannot have the effect of precluding employers from renegotiating contribution rates because, under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), bargaining rights are only subject to "clear and unmistakable" waiver. This argument is specious and we reject it as such.

As we explained in detail in *Link Coal*, the "waiver" argument misses the distinction between the waiver of a right and the exercise of a right that extends into the future. 970 F.2d at 905. "[T]o the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining." *Id.* Here, the UMWA and the BCOA agreed on a basis for determining the employers' pension fund contributions. When the Coal Companies signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against the Coal Companies. There is no issue of waiver in this case.

V. Conclusion

For the reasons set out above, we hold that the District Court properly granted the Trustees' motion for summary

judgment on the issue of liability. The judgment of the District Court is therefore affirmed and the case is remanded.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re

UNITED MINE WORKERS OF AMERICA EMPLOYEE BENEFIT PLANS LITIGATION	)	Multidistrict Litigation No. 886 Misc. No. 91-386
UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 88-969 Misc. No. 91-386
THE PITTSTON COMPANY, *et al.*,	)	
Defendants	)	
UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 88-3716 Misc. No. 91-386
PITTSBURG & MIDWAY COAL MINING CO.,	)	
Defendant	)	
JOHN ALLEN PIERCE, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 89-2833 Misc. No. 91-386
UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST, *et al.*,	)	
Defendants	)	

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 91-3241
	)	Misc. No. 91-386
RAWL SALES & PROCESSING CO.,	)	
Defendant	)	

NOTICE OF CORRECTION AND ORDER

On January 31, 1992, this Court issued a Memorandum Opinion and Order in the above-captioned cases. Inadvertently, it referred to *United Mine Workers of America 1974 Pension Trust, et al. v. Rawl Sales & Processing Co.*, as Miscellaneous No. 91-386. This case should have been referred to its Civil Action No. 91-3241. Therefore, it is this 31st day of January, 1992,

ORDERED that this Court's Memorandum Opinion and Order dated January 31, 1992 is hereby corrected so that all references to Miscellaneous No. 91-386 found in the captions, text of the opinion, and text of the Order are hereby corrected to refer to Civil Action No. 91-3241, the *Rawl* case. A corrected Memorandum Opinion and Order are attached.

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re

UNITED MINE WORKERS OF AMERICA EMPLOYEE BENEFIT PLANS LITIGATION	)	Multidistrict Litigation No. 886 Misc. No. 91-386
UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*, Plaintiffs v. THE PITTSTON COMPANY, *et al.*, Defendants	)	Civil Action No. 88-969 Misc. No. 91-386
UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST, *et al.*, Plaintiffs v. PITTSBURG & MIDWAY COAL MINING CO., Defendant	)	Civil Action No. 88-3716 Misc. No. 91-386
JOHN ALLEN PIERCE, *et al.*, Plaintiffs v. UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST, *et al.*, Defendants	)	Civil Action No. 89-2833 Misc. No. 91-386

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 91-3241
	)	Misc. No. 91-386
RAWL SALES & PROCESSING CO.,	)	
Defendant	)	

MEMORANDUM OPINION

Before the Court are cross-motions for summary judgment in Civil Action Nos. 88-969 (*Pittston*), 88-3716 (*Pittsburg & Midway* (P&M)), 89-2833 (*Pierce*), and Civil Action No. 91-3241 (*Rawl*).[1] The three cases brought by the United Mine Workers of America (UMWA) Pension and Benefit Trusts (the *Pittston*, *P&M*, and *Rawl* cases) are actions to collect delinquent contributions and are brought pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* (ERISA) and § 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a) (LMRA).[2] The case brought by the UMWA and some of its indi-

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[1] On December 18, 1991, the judicial Panel on Multidistrict litigation transferred the *Rawl* case from the Southern District of West Virginia to this Court because it involves questions of fact and law in common with the cases currently pending here. The cases were given Multidistrict Litigation Number 886. At the time of the transfer, cross motions for summary judgment in the *Rawl* case had been fully briefed and argued before Judge Robert J. Staker of the Southern District of West Virginia. After the transfer, the defendants in the *Rawl* case moved this Court to permit additional oral argument on its pending summary judgment motion. The Court has carefully reviewed the briefs and the transcript of the hearing before Judge Staker and does not find any need for additional oral argument. Because the issues and arguments in the *Rawl* case are sufficiently similar to those in the cases already pending before this Court, the Court hereby consolidates the *Pittston*, *P&M*, *Pierce*, and *Rawl* cases for the purpose of this Memorandum Opinion.

[2] The cases brought by the Trusts are styled as actions for a declaratory judgment that defendants Pittston, P&M, and Rawl are obligated to make contri-

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vidual members (the *Pierce* case) is an action for declaratory and injunctive relief to prevent the Trusts from interfering with the collective bargaining agreement entered into between the UMWA and Pittsburg & Midway Coal Mining Co. in 1988 (the 1988 UMWA/P&M Agreement). It is also brought pursuant to ERISA and LMRA. Similarly, in the *Pittston* case, Pittston has filed a counterclaim seeking a declaratory judgment that the collective bargaining agreement, entered into between the UMWA and all of the Pittston Coal Group Companies (collectively referred to as PCG) in 1990 (the 1990 UMWA/PCG Agreement) is a valid and enforceable agreement. Rawl has filed a similar counterclaim with respect to the collective bargaining agreements entered into between the UMWA and Sprouse Creek Processing Company, Inc., Rocky Hollow Coal Company, Inc., Big Bottom Coal Company, Inc., Tall Timber Coal Company, and P.M. Charles Coal Company (collectively referred to as the Rawl Companies) in 1984 (the 1984 UMWA/Rawl Agreements).[3] Having considered the cross motions and supporting memoranda and exhibits, the Court shall grant summary judgment for the Trusts in all four cases for the reasons that follow.

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butions required under the National Bituminous Coal Wage Agreement of 1988 (NBCWA). ERISA provides that a participant, beneficiary, or fiduciary of a plan covered by the Act may bring a civil action:

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

29 U.S.C. § 1132(a)(3). The trustees bring the actions in their fiduciary capacities.

LMRA provides that suits for violations of contracts between an employer and a labor organization may be brought in any district court of the United States. 29 U.S.C. § 185(a).

[3] Sprouse Creek Processing Company, Inc., Rocky Hollow Coal Company, Inc., Big Bottom Coal Company, Inc., Tall Timber Coal Company, and P.M. Charles Coal Company were merged into Rawl Sales and Processing Company on November 3, 1989.

I. BACKGROUND: THE EVERGREEN CLAUSE

Although the causes of action in the four cases at issue are technically distinct, each involves the interpretation of the "evergreen clause" or "continuing contributions clause," which is found in the language of the UMWA 1950 Benefit Plan and Trust (the 1950 Benefit Trust), the UMWA 1950 Pension Trust (the 1950 Pension Trust), the UMWA 1974 Pension Trust (the 1974 Pension Trust), and the 1974 Benefit Plan and Trust (the 1974 Benefit Trust).[4] The terms of these Trusts were negotiated by the Bituminous Coal Operators' Association (BCOA) and the UMWA in 1978. According to the Trusts and the BCOA, who is acting as *amicus curiae* in these cases, the evergreen clause was intended to provide for the long-term financing of pensions and health benefits for elderly miners who retired from the coal industry.[5] Thus, allegedly to ensure that the obligation to contribute would apply equally to all participating employers, the BCOA and the UMWA placed the evergreen clause into the trust documents, which are incorporated by reference into the collective bargaining agreements of every employer that elects to participate in the Trusts, including employers who are not members of the BCOA.

The language of the evergreen clause is the same in each Trust except that the name of the Trust is different in each one. For example, the evergreen clause as first written in the 1950 Benefit Trust provides:

> Any employer who employed any Participant eligible for coverage under, or who receives or received benefits under, the 1950 Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1950

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[4] The *P&M* and *Pierce* cases involve only the 1950 Trusts, while the *Pittston* case involves both 1974 Trusts and the 1950 Benefit Trust. The *Rawl* case involves all four Trusts.

[5] The 1950 Trusts provide pensions and benefits for miners who retired prior to 1976, while the 1974 Trusts provide pensions and benefits to those who retired in 1976 or thereafter.

> Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Benefit Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including, but not limited to, the National Bituminous Coal Wage Agreement of 1984.

1950 Benefit Trust, Article XII (emphasis added). The most recent National Bituminous Coal Wage Agreement (NBCWA) was entered into in 1988 and specifies the amounts to be contributed by employers participating in the 1950 and 1974 Trusts.

The thrust of the Trusts' claim is that the defendant employers obligated themselves to the continuing contributions required by the NBCWA when they either: (1) became signatories to one of the NBCWAs since 1978, which incorporated the Trusts by reference, or (2) entered into individual collective bargaining agreements with the UMWA that were "me-too" agreements patterned after the NBCWA and also incorporating the Trusts by reference. The *Pittston* and *Rawl* cases are an example of the former, while the *P&M* case is an example of the latter.[6]

In *Pittston*, the 1950 and 1974 Trusts were incorporated into the 1984 NBCWA, to which the PCG companies were signatories.[7] Article XX of this agreement covers health and retirement benefits and provides that:

> The United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") is incorporated

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[6] P&M denies that its 1984 collective bargaining agreement with the UMWA was a "me-too" agreement. This will be discussed later in this Memorandum Opinion.

[7] At that time, the PCG companies were members of the BCOA. They have since withdrawn from the BCOA and entered into a separate agreement with the UMWA, the 1990 UMWA/PCG Agreement. This agreement occurred after a lengthy and bitter strike.

> by reference and made a part of this Agreement. The terms of the 1950 Fund have heretofore been amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.
>
> The United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust") is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

1984 NBCWA, Article XX, Section (b) (emphasis added). Using similar language, the 1984 NBCWA incorporated the 1974 Trusts in Article XX, Section (c). Like the PCG Companies, the *Rawl* companies were signatories to an NBCWA that incorporated the 1950 and 1974 Trusts by reference. The last NBCWA that they were signatories to, however, was the 1981 NBCWA, which expired in 1984.[8] It contained language identical to that in Article XX of the 1984 NBCWA.

In the *P&M* case, P&M, as a non-BCOA company, entered into a separate agreement with the UMWA known as the North River Energy Company Coal Wage Agreement of 1984 (1984 North River Agreement). That agreement contained language identical to the language quoted above from the 1984 NBCWA. It too incorporated the 1950 and 1974 Trusts and provided that the terms and condi-

[8] After the 1981 NBCWA expired, the Rawl Companies engaged in a lengthy and acrimonious labor dispute, which finally resulted in the execution of new collective bargaining agreements with the UMWA in 1988.

tions of those Trusts were as set forth in the Trusts themselves. *See* 1984 North River Agreement, Article XX, Sections (b) and (c).

The thrust of the defendant employers' arguments is that federal labor law and policy does not permit interference with the rights of employers and unions to negotiate collective bargaining agreements. Additionally, they argue that the Trusts are collaterally or judicially estopped from attempting to enforce the evergreen clause based on: (1) a recent district court decision in two related cases in this district and (2) the Trusts' apparent inconsistent position with respect to cases in which it has sought withdrawal liability from employers who are not contributing to the Trusts.

II. DISCUSSION: ARGUMENTS AND ANALYSIS

The issues raised in the cross motions for summary judgment fall into three basic categories: (1) the proper interpretation of the language of the Trusts and the collective bargaining agreements, (2) the applicability of federal labor policy, and (3) the applicability of collateral or judicial estoppel.

A. Language Interpretation

1. Plain Language

The defendant employers argue that the 1984 collective bargaining agreements (in the *Pittston* and *P&M* cases) and the 1981 agreement (in the *Rawl* case) specifically limited their obligations to contribute to the Trusts to the duration of those collective bargaining agreements. The 1981 and 1984 NBCWAs and the 1984 North River Agreement provided in a number of places that contributions were to be made "during the life of this Agreement." For instance, in the section covering contributions by employers, the agreements provided that "[d]uring the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below . . . ." 1981 NBCWA, Article XX, Section (d); 1984 NBCWA, Article XX, Section (d); 1984 North River Agreement, Article XX, Section (d). Later, in what is

known as the "guarantee clause," the agreements added more qualifying language:

> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.*
>
> In order to fully fund these guaranteed benefits, the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement. *These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.*

1981 NBCWA, Article XX, Section (h); 1984 NBCWA, Article XX, Section (h); 1984 North River Agreement, Article XX, Section (h). Pittston, P&M, and Rawl now argue that by the express terms of the 1981 and 1984 agreements, once those agreements expired, the defendants' obligations to contribute to the Trusts also expired. In fact, as the defendants point out, the subsequent agreements entered into between the employers and the UMWA (the 1990 UMWA/PCG Agreement, the 1988 UMWA/P&M Agreement, and the 1988 UMWA/Rawl Agreements) specifically provide for the termination of the defendants' obligations to contribute to the 1950 Trusts. A Memorandum of Understanding between the PCG companies and the UMWA, which is incorporated into the 1990 UMWA/PCG Agreement, provides that:

> . . . the PCG Companies shall be deemed to have withdrawn from the UMWA 1950 Pension Plan

> and Trust and the UMWA 1950 Benefit Plan and Trust ("the 1950 Plans") at 12:00 a.m. February 1, 1988. The PCG Companies shall not participate in the 1950 Plans nor shall they be bound by or subject to any term or provision of the documents which govern the existence or administration of the 1950 plans.

Memorandum of Understanding Concerning Participation in the United Mine Workers of America Health and Retirement Funds, ¶ 1 (February 21, 1990) (UMWA/PCG MOU).[9] The 1988 UMWA/P&M Agreement similarly provided for a termination of P&M's contribution obligations:

> As of 11:59 p.m., January 31, 1988 (the "termination date"), the Employer shall totally and permanently [sic] cease to have any obligation to make contributions to the United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust") or to the United Mine Workers of America 1950 Benefit Trust ("1950 Benefit Trust") (collectively the "1950 Trusts").

1988 UMWA/P&M Agreement, Article XX, Section (b).[10] Not surprisingly, the 1988 UMWA/Rawl Agreements followed suit, including a provision stating that "[t]his Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference . . . . " 1988 UMWA/Rawl Agreements, Article XXIV, Section (b).

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[9] This Memorandum of Understanding also contained a so-called "poison pill," which provided that as long as the Trusts approved the 1990 Agreement, the PCG companies would continue to contribute to the 1974 Trusts, but at a lower rate than that required by the 1988 NBCWA. Because the Trusts did not approve the Agreement, Pittston argues that the PCG companies have no further obligation to contribute to the 1974 Trusts.

[10] The 1988 UMWA/P&M Agreement also contained a poison pill similar to that contained in the UMWA/PCG MOU.

The Trusts argue that all of the limiting language contained in the 1981 and 1984 NBCWAs and the 1984 North River Agreement referred only to the *rates of contribution* to the Trusts rather than to the *obligation* to continue contributing to the Trusts. In other words, the Trusts argue that the provision providing that "during the life of this Agreement" each signatory employer must contribute certain specified amounts, means that those specified rates of contribution apply only during the life of the collective bargaining agreement. Upon the expiration of the agreement, the obligation does not cease, but the rates of contribution may change in accordance with the rates set out in the successor NBCWA. The same argument can be made with respect to the language of the guarantee clause contained in the 1981 and 1984 NBCWAs and the 1984 North River Agreement, quoted above.

In addition to their arguments based on the limiting language of the 1984 Agreements, the defendants have another argument based on the language of the evergreen clause itself. They argue that their 1988 and 1990 individual collective bargaining agreements with the UMWA are "successor agreements" within the meaning of the evergreen clause. The Court finds this argument unpersuasive.

The evergreen clause provides that employers who choose to participate in the Trusts become obligated to comply with the terms and conditions of the Trusts, "including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements *thereto*, including, but not limited to, the National Bituminous Coal Wage Agreement of 1984." (Emphasis added.) Notwithstanding defendants' arguments to the contrary, it is clear to the Court from the language of the evergreen clause that the word "thereto" specifically refers to the National Bituminous Coal Wage Agreement of 1978. The only successor agreements to that agreement are the National Bituminous Coal Wage Agreements of 1984, 1988, and subsequent years.

Although the Court finds no ambiguity in the meaning of "successor agreements thereto," the Court is less certain about the proper interpretation of the remaining language of the evergreen clause and the 1981 and 1984 collective bargaining agreements. Because this language is " 'reasonably susceptible of different constructions or

interpretations,' " *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C. Cir. 1979) (citation omitted), the Court will consider extrinsic evidence to determine the intent of the contracting parties.[11] This circuit made this exception to the parole evidence rule clear with respect to collective bargaining agreements, stating that:

> when interpreting collective bargaining agreements, extrinsic evidence of the meaning of disputed clauses such as past practice, related agreements, and bargaining history are quite properly considered to determine the parties' intentions, especially where the Agreement is ambiguous.

United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators' Ass'n, 898 F.2d 177, 180-81 (D.C. Cir. 1990).[12]

2. Extrinsic Evidence

Before the Court can consider extrinsic evidence, it must determine what extrinsic evidence is relevant to this case. P&M argues

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[11] In the *Pittston*, *P&M*, and *Pierce* cases, which have been pending in this Court for some time, the parties have had at least two years to conduct discovery. In the *Rawl* case, which was recently transferred here from the Southern District of West Virginia, the parties have not yet conducted discovery. Nevertheless, much of the extrinsic evidence produced in the *Pittston*, *P&M*, and *Pierce* cases is relevant to the *Rawl* case. Thus, the Court will consider this evidence for the purpose of deciding all four summary judgment motions, and will not permit further discovery by any party to any case at this time.

[12] Defendants argue that *Connors v. Barrick Gold Exploration, Inc.*, 745 F. Supp. 747 (D.D.C. 1990) (Revercomb, J.), *aff'd*, 1991 WL 71481 (D.C. Cir. 1991), prohibits reliance on extrinsic evidence. This is too broad a reading of that case, in which the court noted that it should consider only the provisions of a collective bargaining agreement, and not extrinsic evidence, if the provisions "are clear and unambiguous on their face." *Id.* at 747. Because the Court has already determined that the provisions of the evergreen clause and the 1984 collective bargaining agreements are not "clear and unambiguous," the Court may properly rely on extrinsic evidence.

that only the intent of P&M and the UMWA when they negotiated the 1984 North River Agreement is relevant. The Trusts, however, argue that the intent of the BCOA and the UMWA in negotiating the terms of the Trusts and the 1984 NBCWA are relevant because the 1984 North River Agreement was merely a "me-too" agreement.[13] This Circuit has held that the intent relevant to interpreting a me-too contract "is that of the leader . . . , not that of the follower." *Bituminous Coal Operators' Ass'n, Inc. v. Connors*, 867 F.2d 625, 635 (D.C. Cir. 1989).[14] Accordingly, the Court will look to evidence of the intent of the BCOA and the UMWA when negotiating the Trusts and the 1984 NBCWA.[15]

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[13] Pittston does not make an argument over the relevant evidence beyond arguing that no extrinsic evidence should be considered. Presumably this is because the PCG companies were signatories to the 1984 NBCWA, thus the intent of the BCOA and the UMWA is necessarily the relevant intent.

Rawl also does not make a separate argument about the scope of extrinsic evidence to be considered.

[14] P&M argues that its 1984 North River Agreement was not a me-too agreement. This argument is unpersuasive because in P&M's own motion for summary judgment, it admits that

> In the 1984 North River Agreement, the company adopted most of the terms stated in the collective bargaining agreement between the UMWA and the Bituminous Coal Operators Association ("BCOA"), called the 1984 National Bituminous Coal Wage Agreement ("1984 NBCWA").

P&M Memorandum in Support of Motion for Summary Judgment (P&M Summary Judgment Memorandum) at 4. The only terms that differed from the NBCWA regarded regular vacation periods, Christmas/New Year's shutdown, no reimbursement for advanced health premiums, frequency of paydays, bereavement pay, and protective gloves. *Id.* at n.1. These differences do not appear to be significant enough to take the 1984 North River Agreement out of the realm of me-too contracts.

[15] Even if the Court wanted to consider evidence of the intent of P&M and the UMWA in negotiating the 1984 North River Agreement, P&M has supplied the Court with *no* such evidence. P&M instead argues that the language of the North River Agreement is clear and the Court should interpret it by looking at the entire agreement. Pittston argues that if the Court considers the Trusts' extrinsic evidence, then it must permit Pittston to conduct discovery in

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The Trusts' evidence of the intent of the evergreen clause is voluminous and persuasive. The Trusts have submitted the declarations of five people who took part in the negotiations between the BCOA and the UMWA in 1978, four of which are former BCOA negotiators and one of which is a former UMWA negotiator (who is now a trustee). Allegedly, it was as a result of these negotiations that the evergreen clause was added to the 1950 and 1974 Trusts. The declarations establish that the evergreen clause was written to ensure that all employers participating in the Trusts would share equally in the burden of amortizing the existing Trust deficits and in funding future benefits. In 1978, when the language was negotiated, the 1950 funds had about $6 billion in unfunded liabilities. The BCOA was allegedly concerned that without an obligation to continue contributing to the Trusts, some employers would try to terminate or reduce their contributions, thus leaving other employers to carry more than their share of the Trusts' liabilities. Roger M. Haynes, who was the chairman of the BCOA subcommittee on benefits for the 1978 negotiations (as well as for the 1971, 1974, 1981, and 1984 negotiations), states in his declaration as follows:

> The evergreen clause was not a "technical" provision to assist the Funds in collecting delinquent contributions, and was not discussed in those terms. It was an important provision negotiated to make sure that any coal operator that voluntarily agreed to participate in the Funds in 1978 could not simply

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order to respond. Pittston argues that rule 56(f) should be applied liberally to permit such discovery. Pittston has had two years to conduct discovery, knowing that the Court would likely consider extrinsic evidence. Discovery thus far has been voluminous to say the least. The Court will not now reward Pittston's decision to squander its time by granting it another lengthy period of discovery.

With respect to Rawl, which also seeks discovery if the Court considers extrinsic evidence, this Court finds that the evidence already submitted in connection with the other pending cases and with the *Rawl* case is sufficient for this Court to make a determination about the meaning of the evergreen clause.

> walk away from the Funds and leave its retirees behind, or negotiate cut-rate contributions with the UMWA, at the expense of the remaining employers. . . .
>
> . . .
>
> These provisions were placed in the trust documents so that we could be sure that the trust documents would apply to any non-BCOA employer that wanted to participate in the Funds, even if that employer was not signatory to the NBCWA. In other words, an employer did not have to be a BCOA member or even signatory to a wrap-around contract to participate in the Funds. Non-BCOA employers were free to negotiate with the UMWA any terms and conditions of employment that they could negotiate. But once an employer agreed with the UMWA to participate in the Funds by using the Funds to provide benefits to its employees and retirees, that employer had to participate on the same terms as all other participating employers. Each employer had to contribute to the Funds at the same rate, and each would receive the same level of benefits for its employees and retirees. By insisting on these contractual preconditions for participation in the Funds in 1978 and thereafter, the Funds' settlors, BCOA and the UMWA, agreed that the Funds should not become a "last man's club" where certain employers could pull out entirely, or contribute at reduced rates, at the expense of the remaining employers.

Second Declaration of Roger M. Haynes at ¶¶ 19 and 21 (Second Haynes Declaration). Mr. Haynes' statements are illustrative of the declarations of the other former BCOA negotiators. Each recounts the negotiation of the evergreen clause as an attempt to ensure that the Trusts would not become a "last man's club." Additionally,

transcribed notes and minutes of the 1977-78 negotiations support the declarations and the Trusts' position that the BCOA was concerned about preventing employers from pulling out of the Trusts and leaving the remaining employers to foot the bill for retirees of those employers who had pulled out or had gone out of the coal-mining business.[16] During the 1979 congressional hearings on the Multiemployer Pension Plan Amendments Act of 1980 (which amended ERISA), Donald Pierce, who had participated in the 1978 negotiations on behalf of the UMWA, testified as follows:

> We think it is imperative that existing, participating employers in multiemployer plans be kept in the fold. In the last negotiations, the Mine Workers and the operators added the following parallel language to each of the plans in trust, and that language, which I shall not quote [the evergreen clause language], essentially obligated all present employers who were contributing to the multiemployer plans, to continue contributing into the future based on contributions called for in successor agreements to the National Bituminous Coal Wage Agreement, whether or not that particular employer remained signatory to the Wage Agreement.
>
> By attempting to insure that as many employers as possible remained, the union, of course, was helping to guarantee that an ever-increasing liability would not be added to employers who might remain, had other employers abandoned the plan.

Declaration of Donald E. Pierce, Jr. (Pierce Declaration), Exhibit A. Without detailing the numerous other examples provided as exhibits to the Trusts' cross motions, suffice to say that the Trusts have made an extremely persuasive showing regarding the intent of the evergreen clause.

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[16] Indeed, this appears to be what may have occurred. For instance, according to the Trusts' unrebutted allegations, there are over 2,000 retirees of PCG companies still receiving benefits from the Trusts.

The defendant employers, on the other hand, have submitted virtually *no* evidence to rebut the Trusts' showing of intent.[17] Instead, they rely on the argument that the Court need not consider extrinsic evidence or, in the alternative, that the intent of the BCOA and the UMWA is irrelevant. Additionally, they argue that the Trusts made up their current theory in 1986 (Rawl argues it was not created until 1988), after employers began entering into collective bargaining agreements that did not conform to the obligations allegedly required by the evergreen clause. To support this argument, P&M and Rawl point to a November 1986 decision of the Board of Trustees of the UMWA Health and Retirement Funds, in which the Board ruled that, with respect to "nonconforming" agreements:

> (a) While the Union and an employer are obviously free in their collective bargaining to choose whatever plan of benefits coverage they may agree upon, if they agree that the employer is to contribute to any one of the Plans established under the National Bituminous Coal Wage Agreement, then the employer must contribute to such Plan on the basis of the contribution rate established under that Agreement, and on no other rate.
>
> (b) Appropriate remedial measures shall be taken by the Funds to ensure that participation in the National Agreement Plans is in accordance with the foregoing standard.

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[17] There is no reason that the defendant employers should not have been able to find evidence of contrary negotiating history, if any was there to find. The UMWA has been actively involved in these cases from the very beginning, as *amicus curiae* in the *Pittston* and *Rawl* cases and as the plaintiff in the *Pierce* case. The UMWA was a negotiating party when the evergreen clause was agreed to in 1978. Certainly if the UMWA had evidence that the clause was not intended to create a continuing obligation, it would have introduced such evidence in these cases.

407th Meeting of the Board of Trustees of the United Mine Workers of America Health and Retirement Funds, November 24, 1986, at 3. Nothing that has been proffered to the Court suggests that the Board's decision was anything other than a policy statement about how to respond to nonconforming agreements in light of the history and intent of the evergreen clause. There is no evidence that this decision was the creation of some novel new theory upon which the Trusts could subsequently base their litigation

The *only* statement that defendants have pointed to that arguably supports their position is an alleged statement by Donald Pierce, made at a Trustees' meeting in 1988. The statement was made during a discussion of a motion, proposed by Pierce, to accept participation in the Trusts by a certain employer on terms that apparently did not conform to the terms in the NBCWA.[18] The motion was opposed by other trustees, who recounted the history of the evergreen clause at length. The meeting minutes then indicate the following:

> Trustee Pierce noted that the companies here had not signed the 1984 Wage Agreement, and that the Trustees have not taken the position that the UMWA and an employer cannot alter the employer's obligation under the "evergreen" provisions of the Plan documents. That situation is not present in the *Pittston*, *A&E* and related litigation, and such a conclusion may be unsupportable as a matter of labor law.

426th Meeting of the Board of Trustees of the United Mine Workers of America Health and Retirement Funds, June 7, 1988, at 4. The Trusts explain Pierce's first statement as an argument that with respect to new signatories, any level of contribution was better than no contribution at all. This argument was rejected by the other trustees. Pierce's second statement, referring to the *Pittston* litiga-

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[18] The proposal under consideration had been made by A.T. Massey Coal Company, the parent company of Rawl.

tion, was also rejected by the other trustees who now seek to enforce the evergreen clause.

The Court confesses to a great deal of confusion over the import of Pierce's statement. Certainly, to the extent that Pierce was advocating a position contrary to that now taken by the Trusts, it is clear that the position was rejected by the other trustees and as such should not have any effect on the merits of the cases now before the Court. Whether Pierce's statement is any indication of his recollection of the intent of the evergreen clause is, however, a more difficult question. The Court is nevertheless persuaded by Pierce's subsequent declaration that the evergreen clause was intended to prevent participating employers from withdrawing from the Trusts and leaving the liabilities to the remaining employers. This declaration is consistent with all of the other evidence of intent produced by the Trusts and is consistent with Pierce's own testimony at Congressional hearings held in 1979.

Having reviewed the voluminous evidence of the negotiating history of the evergreen clause, the Court is convinced that the clause was intended to ensure that all participating employers would contribute equally to the Trusts and would not be permitted to withdraw from participation and leave the burden for funding the pensions and health benefits of retired miners to the remaining participating employers. By so holding that this is the proper interpretation of the evergreen clause, two issues remain:- (1) is the obligation created by the evergreen clause permissible under federal labor law; and (2) are the Trusts collaterally or judicially estopped from taking their current position with respect to the evergreen clause?

B. Federal Labor Policy

Although the parties argue strenuously over federal labor policy, all are in agreement about most of the fundamental precepts. All agree that collective bargaining obligations are determined by contract and that parties to collective bargaining are free to negotiate the terms of their agreement. P&M even agrees that parties can create obligations that survive the expiration of a collective bargaining agreement. The basis for such a continuing obligation "must

necessarily find its genesis in the collective bargaining agreement." *UAW v. Yard-Man Inc.*, 716 F.2d 1476, 1479-83 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). *See also Nolde Bros. Inc. v. Local No. 358, Bakery & Conf. Workers Union*, 430 U.S. 243 (1977). Having agreed to this much, P&M asserts that only when the collective bargaining agreement clearly expresses the parties' intent to create a long-term obligation will a court enforce such an obligation. It then argues that the 1984 North River Agreement does not clearly express such an intent and, in fact, expresses an opposite intent by virtue of the limiting language discussed at length above.

The argument made by Pittston and Rawl, though stated in different terms, is basically the same. As a premise, they, like P&M, argue that the PCG companies and the Rawl companies have a statutory right to bargain with the UMWA over pension and benefits issues. This right has never been disputed. Pittston and Rawl then admit that they may waive their statutory rights, but argue that a court will not find a waiver unless it is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 & n.12 (1983); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114-15 (D.C. Cir. 1986). Next, just as P&M argued that its 1984 North River Agreement did not clearly express the intent to create a continuing obligation, Rawl and Pittston argue that neither the 1981 or the 1984 NBCWA constituted a "clear and unmistakable" waiver of their right to renegotiate contributions to the Trusts in the future.

Having made these arguments, the defendants seek this Court's declaration that the subsequent collective bargaining agreements entered into between the employers and the UMWA (the 1988 UMWA/P&M Agreement, the 1988 UMWA/Rawl Agreement, and the 1990 UMWA/PCG Agreement), are valid and enforceable and may not be collaterally attacked by the Trusts. Defendants' arguments, however, merely beg the question of how to interpret the evergreen clause. The 1988 and 1990 agreements can only be valid if the Court determines the evergreen clause does not create a continuing obligation. As the Court has already held, the negotiating history of the evergreen clause evidences a clear intent to create a

continuing obligation.[19] Thus, the Court cannot issue the declaration that the defendants request unless it determines that the evergreen clause is invalid or unenforceable for other reasons.

Defendants pose only one other argument to attack the validity of the evergreen clause. They argue that the clause as interpreted by the Trusts creates an indefinite or perpetual obligation that is unenforceable by the courts. It is true that "[l]abor contracts of indeterminate duration or ones that do not provide a manner of termination are terminable at will." *Montgomery Mailers' Union 127 v. Advertiser Co.*, 827 F.2d 709, 715 (11th Cir. 1987) (citing *Communications Workers of America v. Southwestern Bell Telephone Co.*, 713 F.2d 1118, 1123 n.4 (5th Cir. 1983); *Boeing Airplane Co. v. N.L.R.B.*, 174 F.2d 988, 991 (D.C. Cir. 1949)). Thus, the defendants argue that they were free to terminate their obligation to contribute to the Trusts when their 1981 and 1984 collective bargaining agreements with the UMWA expired in 1984 and 1988, respectively.

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[19] In its briefs, P&M cites several cases in which courts have purported to rule that the obligations of an employer pursuant to a collective bargaining agreement expire with the termination of the collective bargaining agreement. As a general proposition, this is indisputably true. However, as the parties have already agreed, an obligation may extend beyond the termination of the collective bargaining agreement if that intent is clearly expressed in the terms or negotiating history of the agreement. In the cases cited by P&M, none of which involved the interpretation of the evergreen clause, the courts looked at the negotiating history and determined that there was no intent for the obligations at issue to extend beyond the expiration of the agreement. These cases have no real relevance to the cases now before the Court because they involved entirely separate obligations with entirely separate negotiating histories. These cases include: *District 29, United Mine Workers of America v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985) (determining that employer's obligation to provide certain benefits directly to retirees expired with termination of collective bargaining agreement); *District 17, United Mine Workers of America v. Allied Corp.*, 765 F.2d 412 (5th Cir.) (*en banc*) (implying the same) *cert. denied*, 473 U.S. 905 (1985); *United Mine Workers of America International Union v. Nobel*, 720 F. Supp. 1169 (W.D. Penn. 1989) (same), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991); *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986) (same).

The Trusts make several rebuttal arguments. First, they note that the issue in this case involves a single provision of a contract, not an entire labor contract. P&M has already agreed that a provision of a contract may survive the termination of the contract as long as such an intent is clearly expressed in the contract. Secondly, the Trusts argue that the evergreen clause is not indefinite or perpetual. Rather, the obligation to contribute continues only as long as the BCOA and the UMWA set new contribution rates in the NBCWA. Because the obligation is thus terminable upon the occurrence of a specific event, *i.e.*, the BCOA and the UMWA agreeing not to set new contribution rates, the Trusts argue that it is not terminable at the will of the defendant employers and the Union. *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1012 (7th Cir. 1985); *Payroll Express Corp. v. Aetna Casualty & Surety Co.*, 659 F.2d 285, 291-92 (2d Cir. 1981). Moreover, the Trusts note that it is common for courts to enforce contractual obligations to finance the pensions and benefits of retired employees even after the expiration of the contract providing for such benefits. *See, e.g., United Steelworkers of America v. Connors Steel*, 855 F.2d 1499, 1504-05 (11th Cir. 1988) (when contract provided that pensioners "shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the company . . . ," court held that employer's obligation to provide benefits continued after the expiration of the negotiated labor contract); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Its Local 784 v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 808-09 (6th Cir. 1984) (even when contract did not expressly state that retirees' benefits shall not be terminated or reduced, court held that it was intention of the parties that retirement benefits be made payable for the life of the retired employees, even after the expiration of the contract).

Finally, the Trusts argue that the basic proposition that contracts of indefinite duration are terminable at will is a rule of contract interpretation that can be overcome by evidence of contrary intent. The Trusts cite *Hodge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C. Cir. 1983), in which this circuit, in the employment contract context, wrote that "[t]hough the classic assumption of the

law is that the parties intend a contract of indefinite term to be terminable at will, basic principles of contract law inform us that the parties can contract otherwise. The controlling factor is the intent of the parties with respect to the terms of the contract . . . ." *Id.* at 1568. With this rule of law as a background, once again the issue comes back to what the parties intended the evergreen clause to mean.

In support of their interpretation of the evergreen clause, the Trusts argue that national labor policy strongly favors the enforcement of contractual promises to contribute to multiemployer benefit funds. The Trusts cite some of the legislative debate over the Multiemployer Pension Plan Amendments Act of 1980, which added section 515 to ERISA, 29 U.S.C. § 1145. During this debate, Representative Thompson and Senator Williams stated that "[s]ound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

Similarly, the Trusts cite cases such as those already cited in this Opinion, in which courts have held that retirement rights may not be altered merely by negotiating a new agreement, absent the consent of the pensioners. *See Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181-82 (1971). They also cite a litany of cases in which courts have noted the danger posed by unions entering into arrangements with particular employers that "might compromise the broader interests of the plan as a whole," *Central States v. Central Transport, Inc.*, 472 U.S. 559, 579 (1985), and have reiterated that each union and employer participating in a plan "has an interest in the prompt collection of the proper contribution from each employer." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 373 (1984). In short, the Trusts make the argument that goes to the heart of their case: without the Court's enforcement of the evergreen clause, the defendant employers and the UMWA will be permitted to compromise the broader interests of the 1950 and 1974 Trusts and adversely effect other participating employers who continue to make the required contributions.

The Court finds the Trusts' arguments persuasive. Without disputing any of the fundamental labor policies advocated by the

defendants, the Court is convinced that the BCOA and the UMWA intended to create a continuing obligation to contribute to the Trusts once an employer makes the decision to participate. There is no evidence that the defendant employers were not aware of this obligation when they made the decision to participate in the Trusts. In light of this, it would run afoul of national labor policy for this Court to dishonor the parties' intentions and invalidate the evergreen clause as an unenforceable provision of indefinite duration. Therefore, the Court holds that the evergreen clause is neither invalid nor unenforceable based on federal labor policy.

C. Collateral and/or Judicial Estoppel

The defendants' final and perhaps most persuasive arguments in support of their motions for summary judgment involve collateral estoppel and judicial estoppel.

1. Collateral Estoppel

The doctrine of collateral estoppel, also referred to as issue preclusion, provides that " 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.' " *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Although mutuality is no longer a requirement of collateral estoppel, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (D.C. 1979), the doctrine does have some strict requirements. First, the issue "must have been actually litigated, that is, contested by the parties and submitted for determination by the court." *Otherson v. Dept. of Justice*, 711 F.2d 267, 273 (D.C. Cir. 1983). Second, the issue "must have been 'actually and necessarily determined by a court of competent jurisdiction.' " *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Third, preclusion "must not work an unfairness" because "the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Id.* The potential for

unfairness is especially acute when a party in the second case was not a party to the first case.

The defendant employers argue that the Trusts are collaterally estopped from litigating the evergreen clause based on two grounds: (1) the recent district court decision in the consolidated cases of *Connors v. Island Creek Corp., et al.*, No. 87-1212, and *Connors v. Drummond Coal Co., et al.*, No. 87-1973 (D.D.C. Jan. 17, 1991) (Harris, J.) (collectively referred to as the *Island Creek* cases); and (2) the Trusts' apparent inconsistent position taken with respect to earlier cases in which they sought withdrawal liability.

a. The Island Creek Cases

In the *Island Creek* cases, even the Trusts admit that the evergreen clause and its enforceability were put into issue. The cases were brought by the 1950 Pension Trust to force the defendants, who were signatories to the 1984 NBCWA, to contribute to the Trust at the rate provided in that agreement, $1.11 per ton. Apparently, during the term of the 1984 NBCWA, the 1950 Pension Trust had become fully funded. The defendant employers and the UMWA then entered into Employment and Economic Security Pacts (EESPs) that reduced the contribution rate from $1.11 per ton to $0.25 per ton. The 1950 Pension Trust argued that the evergreen clause prevented the defendants from negotiating contribution rates that differed from those in the NBCWA.

The difficulty in analyzing the preclusive effect of Judge Harris' decision in the *Island Creek* cases is that although he granted summary judgment for the defendants, he issued no written opinion.[20] His brief two-paragraph Order merely states that "[o]n the facts and circumstances presented in these cases, the Court concludes that summary judgment in favor of the defendants is appropriate." *Connors v. Island Creek Corp., et al.*, No. 87-1212 and *Connors v. Drummond Coal Co., et al.*, No. 87-1973 (D.D.C. Jan. 17, 1991). The defendants argue that the validity of the evergreen clause was necessarily determined by this decision and that Judge

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[20] The *Island Creek* cases are currently on appeal.

Harris' holding is implicit: employers who have participated in the 1950 Pension Trust may negotiate separate agreements with the UMWA that modify their obligations in a way that is inconsistent with the NBCWA.

The Trusts have several rebuttals to this argument. First, they argue that although the meaning of the evergreen clause was put in issue in the *Island Creek* cases, it was not "actually determined" by Judge Harris. This is because the defendants in the *Island Creek* cases allegedly relied heavily on the fact that the 1950 Pension Trust was fully funded and the reduced contributions would have no effect on the actuarial soundness of the Trust. The Trusts cite several examples from oral argument in which counsel for the defendants stressed the importance of this fact. At one point counsel noted that this fact "distinguishe[d] this case from all of the other cases." Transcript of Oral Argument in *Island Creek* cases at 7 (Jan. 7, 1991). Counsel and Judge Harris both noted that this factual difference, among others, was the reason that the *Island Creek* cases were not consolidated with the cases now before this Court. Counsel repeatedly reiterated that the EESPs were to take effect "only after full funding had occurred and there could be no actuarial harm to the 1950 Pension Fund." *Id.* at 11. Judge Harris also reiterated the point, asking counsel whether full funding was in fact achieved before the lower contribution rate came into effect. *Id.* Based on these repeated references to the 1950 Pension Trust's full funding status, the Trusts suggest that the only issue actually determined by Judge Harris was that the employers and the UMWA are free to negotiate a reduced contribution rate to a fully funded trust.

The defendants' main rebuttal to this argument is that this circuit has already held that signatories to the 1984 NBCWA or a "me-too" agreement, which, by their terms, required employers to make contributions at a certain level, must continue to make the specified contributions without regard to the funding level of the Trust. *Bituminous Coal Operators' Ass'n v. Connors*, 867 F.2d 625 (D.C. Cir. 1989). Thus, the defendants argue that Judge Harris could not have been relying on the funding level of the 1950 Pension Trust when he granted summary judgment for the defendants in the *Island Creek* cases.

This Court need not speculate about the basis of Judge Harris' decision. This circuit has recently held, in no uncertain terms, that "if the basis of [a prior] decision is unclear, and it is thus uncertain whether the issue was actually and necessarily decided in that litigation, then relitigation of the issue is not precluded" by collateral estoppel. *Connors v. Tanoma Mining Co., Inc., et al.*, Nos. 91-7028, 91-7036, 91-7037, 91-7038, Slip Op. at 5 (D.C. Cir. decided January 28, 1992). Because there was no written decision issued in the *Island Creek* cases, the basis for that decision is indisputably unclear. Therefore, this Court cannot hold that the validity of the evergreen clause was "actually and necessarily decided" in those cases and collateral estoppel will not operate to bar the litigation of the issue in the cases now before the Court.

b. The Withdrawal Liability Cases

The defendants point to four cases in which the Trusts brought claims for withdrawal liability under ERISA after the defendant coal companies ceased contributing to the Trusts upon the expiration of their collective bargaining agreements. To seek withdrawal liability under ERISA, an employer must have made a complete or partial withdrawal from a multiemployer pension or benefit plan. 29 U.S.C. § 1381(a). A partial withdrawal occurs when an employer's contributions drop below a certain level. *Id.* at § 1385. A complete withdrawal occurs when the employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." *Id.* at § 1383(a). In the cases referred to by defendants, the defendant employers were signatories to the 1978 NBCWA. When that Agreement expired in 1981, the defendants ceased contributing to the Trusts yet continued coal mining operations. The Trusts then brought their claims for withdrawal liability by alleging that when the 1978 NBCWA expired in 1981, the employers ceased having an obligation to the Trusts and thus completely withdrew from the Trusts within the meaning of 29 U.S.C. § 1383(a). This position, the defendants allege, is directly contrary to the position the Trusts take in this case.

The defendants' argument is compelling. In *Combs v. Pelbro Fuel, Inc.*, No. 83-1524 (D.D.C. filed May 27, 1983), the Trusts' Proposed Findings of Fact and Conclusions of Law stated the following:

> Pelbro "permanently cease[d] to have an obligation to contribute" to the Plans, as meant by Section 4203(a)(1) of ERISA, on March 27, 1981, when the 1978 Wage Agreement expired. Pelbro obviously ceased to have an obligation to contribute under a "collective bargaining (or related) agreement" on that date, as meant by Section 4212(1) of ERISA, 29 U.S.C. § 1392(1). Further, because the 1978 Wage Agreement in terms limited a signatory employer's obligation to contribute to "the life of this Agreement" and for "periods of time . . . ending when this Agreement is terminated," Pelbro also ceased to have an obligation to contribute under "applicable labor-management relations law" on that date, as meant by Section 4212(2) of ERISA.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law, No. 83-1524 at ¶ 4 (July 1984). The Trusts took a similar position in *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986) and in *Connors v. Van Mulvehill*, 679 F. Supp. 1071 (N.D. Ala. 1988). Additionally, in *Garland Coal Co.*, 7 Employee Benefits Cas. (BNA) 1771, 1772-73 (1986), the Trusts argued in an arbitration proceeding that an employer had withdrawn from the Trusts when its collective bargaining agreement expired rather than at a later date urged by the defendant employer. In each of these cases, the employers discontinued contributing to the Trusts when the 1978 NBCWA expired in 1981. Thus, these cases represent an earlier group of cases than those now before the Court, which involve employers who ceased contributing after their 1981 and 1984 collective bargaining agreements expired.

The Trusts argue that the evergreen clause was not actually litigated and determined in any of these cases, therefore collateral estoppel does not apply. This is indisputably true with respect to

the *Pelbro*, *B&W Coal*, and *Van Mulvehill* cases, in which the Trusts alleged in their complaints that the defendant employers had ceased having an obligation to contribute to the Trusts. This is also true with respect to the *Garland Coal* case, in which the dispute was over the date of the employer's withdrawal from the Trusts. In none of these cases was the evergreen clause ever discussed or disputed. It simply was not mentioned. Accordingly, none of the elements of collateral estoppel have been met. Under this circuit's recent decision in *Tanoma Mining*, this Court holds that the Trusts are not collaterally estopped from litigating the evergreen clause based upon the allegedly contrary position taken in four earlier withdrawal liability cases.

2. Judicial Estoppel

Judicial estoppel " 'precludes a party from taking a position inconsistent with one previously taken with respect to the same facts in an earlier litigation.' " *Donovan v. United States Postal Service*, 530 F. Supp. 894, 902 (D.D.C. 1981) (quoting *Himel v. Continental Ill. Nat'l Bank*, 596 F.2d 205, 210-211 (7th Cir. 1979)). The object of the doctrine of judicial estoppel " 'is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings.' " *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting *Melton v. Anderson*, 32 Tenn. App. 335, 339 (Ct. App. 1948)). Unlike equitable estoppel, it does not require proof of privity, reliance, or prejudice. *Id.* Instead, it is invoked "to prevent a party from playing 'fast and loose with the courts.' " *Id.* (quoting *Scarano v. Central Railroad*, 203 F.2d 510, 513 (3d Cir. 1953)). Without ever expressly rejecting the doctrine, this circuit has expressed its wariness of judicial estoppel, agreeing with the Tenth Circuit that its utilization " 'would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.' " *Id.* at 938 (quoting *Parkinson v. California Co.*, 233 F.2d 432, 438

(10th Cir. 1956)). *See also American Methyl Corp. v. E.P.A.*, 749 F.2d 826, 833 n.44 (D.C. Cir. 1984).

Assuming that the doctrine is still viable in this circuit, the criteria for its application were spelled out in *Donovan*: "(1) the same facts must be in issue . . . , (2) the judicial body must have 'been led astray,' . . . and (3) the assertions must not have been based on fraud, inadvertence, or mistake . . . ." 530 F. Supp. at 90 (citing *Konstantinidis*, 626 F.2d at 937 & 939). Stated a bit differently, this circuit has held that the doctrine applies only to "cases in which a party prevails on a claim in one court and proceeds in a calculated manner to manipulate a second court by asserting facts at odds with those advanced before the first court." *American Methyl*, 749 F.2d at 833 n.44.

The Trusts argue that the same facts are not in issue in the present cases as were in issue in the withdrawal liability cases because the evergreen clause was not at issue in those cases. Additionally, they argue that they have not deliberately manipulated the judicial process to their advantage. Instead, they point out that the few cases in which they sought withdrawal liability were brought in the early 1980s against relatively small employers. These cases were but a small fraction of the many cases regularly brought by the Trusts for withdrawal liability after coal companies cease operations. Later, as more and more larger employers such as the defendants in these cases began to cease contributing while remaining in business, the trustees engaged in a full analysis of the problem and determined that the evergreen clause imposed an obligation on employers that survived beyond the termination of their collective bargaining agreements. Ever since, the Trusts have conformed all of their practices to this interpretation and have not sought withdrawal liability in any case in which the evergreen clause is involved.[21] Although there is no doubt an inconsistency in the positions taken by the Trusts over the years, the Court simply does not have before it any evidence of calculated manipulation of the courts or bad faith. For these reasons, as well as the general preference against the

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[21] The only cases cited by defendants in which withdrawal liability was sought involved the cessation of contributions in 1981 upon the expiration of 1978 collective bargaining agreements.

doctrine, the Court will not bar this litigation on the basis of judicial estoppel. The Court may, however, consider the Trusts' inconsistent positions as a judicial admission.

3. Judicial Admissions

Although a judicial admission is binding only in the case in which it was made, a court may consider a judicial admission as evidence in another case. *See Universal American Barge Corp. v. J-Chem, Inc., et al.*, 946 F.2d 1131 (5th Cir. 1991); *State Farm Mutual Auto Ins. Co. v. Worthington*, 405 F.2d 683 (8th Cir. 1968). Such evidence may, however, be contradicted by other evidence when presented. *Id.*

In this case, the Court takes notice of the fact that, despite the reams of negotiating history supporting the Trusts' interpretation of the evergreen clause, the Trusts failed to rely on the clause a mere four years after it was negotiated when they moved for withdrawal liability in the *Pelbro, B&W Coal, Van Mulvehill,* and *Garland Coal* cases. One certainly would have thought that as important as the clause allegedly is, the Trusts would have brought suit to enforce the clause rather than to collect withdrawal liability. Their early decisions to seek withdrawal liability, and in doing so to assert that the noncontributing employers had ceased having an obligation to the Trusts, is in direct conflict with their current position that the expiration of a collective bargaining agreement does not result in the expiration of the obligation to contribute. The Court is greatly troubled by this apparent change of position.

As the Court has already discussed, the Trusts' basic excuse for this action is mistake or inadvertence. The Trusts' assert that there was never an occasion to consider bringing suit based on the evergreen clause until the large employers such as Pittston and P&M ceased contributing. At that point, the evidence is clear that the Trustees made a policy decision to begin enforcing the evergreen clause. There is no evidence that the trustees ever realized that they had previously brought actions for withdrawal liability when they should have brought them under the evergreen clause. This, the Court can only speculate, may have been the result of a lack of

communication between the attorneys filing the complaints and the trustees themselves.

Although the Court considers the Trusts' contradictory positions to be some evidence that the evergreen clause was not intended to create the continuing obligation that the Trusts now seek to enforce, this evidence is greatly outweighed by the other evidence before the Court. As has already been detailed, the declarations of five of the negotiators of the evergreen clause establish that the evergreen clause was specifically created to prevent participating employers from withdrawing from the Trusts and leaving the burden of funding retiree benefits to the remaining participating employers. This intent is also clear in the transcripts of testimony before Congress in 1979. Moreover, the Court notes, the interpretation urged by the Trusts makes sense. No employer would want to be left paying for the benefits for retirees of other employers who decided to skip out on their obligations. The evergreen clause, as onerous as it may now appear, was a sensible way to ensure that no single employer or small group of employers would be left holding the bag. To fail to accept the Trusts' interpretation of the evergreen clause would produce just such a result. Ultimately, the remaining employers would be unable to maintain adequate funding and the beneficiaries of the Trusts—the retirees—would be the ones who suffer. The Court is unconvinced that this is the result intended when the evergreen clause was negotiated. The Court declines to bind the Trusts to the assertions made in the pleadings in four relatively minor withdrawal liability cases filed years ago.

III. CONCLUSION

The Court has carefully considered the evidence and arguments of all of the parties to these cases and of the *amicus curiae*. Because the language of the evergreen clause is susceptible to different interpretations, the Court has considered extrinsic evidence of the intent of the clause. This evidence has convinced the Court that, despite the position taken by the Trusts in early litigation, the intent of the clause was to create a continuing obligation to contribute for those employers who elect to participate. Notwithstanding the defendants'

arguments to the contrary, the Court is confident that federal labor policy would not condone dishonoring this intent, as expressed in the evergreen clause and its negotiating history. Because the Court has reached these legal conclusions, and because the parties agree that there are no material issues of fact in dispute, the Court shall, by accompanying Order, grant summary judgment in favor of the plaintiff Trusts in Civil Action Nos. 88-969, 88-3716, and 91-3241, and for the defendant Trusts in Civil Action No. 89-2833.

Dated: January 31, 1992

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re

UNITED MINE WORKERS OF AMERICA EMPLOYEE BENEFIT PLANS LITIGATION	Multidistrict Litigation No. 886 Misc. No. 91-386
UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*, Plaintiffs v. THE PITTSTON COMPANY, *et al.*, Defendants	Civil Action No. 88-969 Misc. No. 91-386
UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST, *et al.*, Plaintiffs v. PITTSBURG & MIDWAY COAL MINING CO., Defendant	Civil Action No. 88-3716 Misc. No. 91-386
JOHN ALLEN PIERCE, *et al.*, Plaintiffs v. UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST, *et al.*, Defendants	Civil Action No. 89-2833 Misc. No. 91-386

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 91-3241
	)	Misc. No. 91-386
RAWL SALES & PROCESSING CO.,	)	
Defendant	)	

ORDER

In accordance with the Memorandum Opinion issued herewith and for the reasons stated therein, it is this 31st day of January, 1992,

ORDERED that defendant Rawl Sales & Processing Company's motion for oral argument be and hereby is denied; and it is

FURTHER ORDERED that summary judgment be and hereby is entered in favor of the plaintiffs in Civil Action Nos. 88-969, 88-3716, and 91-3241, and in favor of the defendants in Civil Action No. 89-2833; and it is

FURTHER ORDERED that this Court hereby declares that the defendants in Civil Action Nos. 88-969, 88-3716, and 91-3241 are obligated to make all of the delinquent contributions to the Trusts in which they have participated as required by the National Bituminous Coal Wage Agreement of 1988; and it is

FURTHER ORDERED that the parties to Civil Action Nos. 88-969, 88-3716, and 91-3241 shall submit to the Court a joint proposed Order setting forth the delinquent contributions owed, together with interest and liquidated damages, in accordance with the Court's ruling in these cases.

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 88-969
	)	MDL No. 886
THE PITTSTON COMPANY, *et al.*,	)	
Defendants	)	
UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 91-3241
	)	MDL No. 886
RAWL SALES AND PROCESSING CO.,	)	
Defendant	)	

MEMORANDUM OPINION

Before the Court are two related motions: a Motion for Reconsideration of this Court's January 31, 1992 Memorandum Opinion granting summary judgment for the plaintiffs, filed by Rawl Sales and Processing Co. (Rawl);[1] and a Motion for Amendment of this Court's January 31, 1992 Order, filed by the Pittston Company, *et al.*, (Pittston). For the reasons that follow, this Court shall deny Rawl's motion, grant Pittston's motion in part, and certify the issues raised in the January 31, 1992 Memorandum Opinion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

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[1] This motion is joined by The Pittston Company, *et al.*

BACKGROUND

On January 31, 1992, this Court issued a Memorandum Opinion and Order granting summary judgment for the plaintiffs, the United Mine Workers of America (UMWA) Pension and Benefit Trusts (collectively referred to as the Trusts), in Civil Action Nos. 88-969 (*Pittston*), 91-3241 (*Rawl*) and two other related cases.[2] In that Opinion, the Court held that the "evergreen clause" or "continuing contributions clause" found in the UMWA 1950 Benefit Plan and Trust (the 1950 Benefit Trust), the UMWA 1950 Pension Trust (the 1950 Pension Trust), the UMWA 1974 Pension Trust (the 1974 Pension Trust), and the 1974 Benefit Plan and Trust (the 1974 Benefit Trust), was intended to create a continuing obligation to contribute to the Trusts for those employers who elected to participate in the Trusts.[3] The Court held that this continuing obligation extended beyond the expiration of the terms of the collective

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[2] The *Rawl* and *Pittston* cases are two of six related cases pending in this Court. Two of the cases, *UMWA 1950 Benefit Plan and Trust, et al. v. Pittsburg & Midway Coal Mining Co.*, No. 88-3716, and *Pierce, et al. v. UMWA 1950 Benefit Plan and Trust, et al.*, No. 89-2833, entered into a settlement and a stipulation of dismissal after this Court issued its Memorandum Opinion. The other two cases, *UMWA 1974 Pension Trust, et al. v. A&E Coal Co. Inc., et al.*, No. 88-1126, and *UMWA 1974 Pension Trust, et al. v. Aloe Coal Company, et al.*, No. 91-207 are still pending before this Court and were not a part of this Court's January 31, 1992 Memorandum Opinion.

The *Rawl* case was transferred to this Court on December 18, 1991 by the Judicial Panel on Multidistrict Litigation. It had originally been filed in the Southern District of West Virginia and, at the time of the transfer, cross motions for summary judgment had been fully briefed and argued before Judge Robert J. Staker of that district. This Court fully considered the briefs in the *Rawl* case and the transcript of the oral argument before Judge Staker before rendering its January 31, 1992 Memorandum Opinion.

[3] The evergreen clause was negotiated by the Bituminous Coal Operators' Association (BCOA) and the UMWA in 1978 and was added to the Trust language at that time. It provided that those employers who elected to participate in the Trusts were obligated to make contributions based on the rates set forth in the 1978 National Bituminous Coal Wage Agreement, and successor agreements thereto.

bargaining agreements in which the defendant employers had elected to participate in the Trusts. In accordance with this holding, the Court ordered the defendant employers, including Rawl and Pittston, to make all of the delinquent contributions into the Trusts in which they have participated, as required by the National Bituminous Coal Wage Agreement (NBCWA) of 1988.

The Court reached its conclusion based on the voluminous briefs of all of the parties and of the *amicus curaie*, as well as on oral argument. Because the Court held that the language of the evergreen clause was susceptible to different interpretations, the Court considered extrinsic evidence of the intent of the clause.[4] The Court then determined that the unrebutted evidence submitted by the Trusts regarding the negotiating history of the clause showed that the clause was intended to create a continuing obligation. No party argued to the Court that summary judgment was inappropriate due to the existence of genuine issues of material fact.

DISCUSSION

A. Motion for Reconsideration

Rawl asserts four separate grounds for its Motion for Reconsideration: (1) its "right" to conduct discovery; (2) the existence of genuine issues of material fact; (3) the existence of affirmative defenses that it needs to explore through discovery; and (4) the collateral estoppel effect of the *Island Creek* cases decided by Judge Harris of this Court and currently on appeal. *See Connors v. Island Creek Corp., et al.*, No. 87-1212, and *Connors v. Drummond Coal Co., et al.*, No. 87-1973 (D.D.C. Jan. 17, 1991).

1. Rawl's "Right" to Conduct Discovery

Rawl's most heated argument is premised on its asserted "right" to conduct discovery into the negotiating history of the evergreen

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[4] At the time the Court issued its Memorandum Opinion, the *Pittston* case had been pending since 1988 and numerous extensions of the discovery deadlines had been sought and granted.

clause. Rawl claims that when this case was originally brought by the Trusts in West Virginia, the parties and the Court agreed that, in order to avoid protracted discovery that would interfere with the company's upcoming collective bargaining negotiations, the parties would file cross motions for summary judgment before embarking on any discovery. Rawl asserts that it specifically reserved its "right" to conduct discovery if the Court concluded that it was necessary to resort to extrinsic evidence. The transcript of a telephone status conference with Judge Staker in West Virginia does not indicate that Rawl ever requested a reservation of its right to conduct discovery or that Judge Staker granted such a request. The transcript reveals only that the parties and the Court agreed that discovery would be stayed pending the Court's ruling on cross motions for summary judgment. The Order entered following the telephone status conference provided that:

> The parties have agreed that discovery shall not be initiated in this case pending the Court's decision on the Motions for Summary Judgment, except upon agreement of the parties or order of this Court for good cause shown.

Exhibit A to Declaration of Jeremiah Collins, submitted as Attachment 1 to the Trusts' Opposition to Rawl's Motion for Reconsideration. Although Rawl never moved the Court to permit it to engage in discovery, it did attempt to reserve its right to discovery in a footnote to its reply brief regarding the cross motions for summary judgment.

Because this Court's Memorandum Opinion explicitly relies on extrinsic evidence, Rawl argues that it should have been permitted to engage in discovery before this Court rendered its Opinion. Rawl argues that, if permitted, it would have deposed the various people who gave declarations on behalf of the Trusts and challenged their credibility.

Despite what Rawl argues that it would do *now*, if given the opportunity, the fact remains that Rawl did not seek leave of the Court to conduct any depositions. Rawl was fully aware that the Court might consider extrinsic evidence because reams of it had

been filed and relied upon by the Trusts in not only the *Rawl* case, but also in the other three related cases in which cross motions were pending.[5] Moreover, Rawl itself submitted extrinsic evidence in support of its motion for summary judgment and in its opposition to the Trusts' cross motion. In fact, Rawl submitted two three-ring binders full of such evidence.

The Court is not persuaded that Rawl's alleged inability to conduct discovery justifies granting Rawl's Motion for Reconsideration. Whatever Rawl thought its "agreement" was regarding discovery, Rawl could have filed a rule 56(f) motion, either before the West Virginia court or before this Court, if it was serious about engaging in discovery. *See* Fed. R. Civ. P. 56(f). That Rawl made the strategic decision not to file such a motion does not now justify reconsidering this Court's ruling so that Rawl may engage in belated discovery.

2. Genuine Issues of Material Fact

a. Additional Extrinsic Evidence

Rawl's most compelling argument is that, based on extrinsic evidence that it has submitted with its motion for reconsideration, there are genuine issues of material fact that preclude summary judgment. Rawl has attached to its motion and supplemental memo five declarations purporting to show that it never had any knowledge of the evergreen clause and that the clause could not have the meaning the Trusts assert because such an interpretation was never communicated to the persons negotiating the collective bargaining agreements on behalf of the employers. The five persons submitting affidavits on behalf of Rawl are Arch Runyon, the vice president of administration for Rawl and the person responsible for employee benefits and labor relations; E. Morgan Massey, who in 1978 was the president of several affiliated companies that were members of

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[5] An affidavit filed by Penny Clark, counsel to the Trusts, also avers that Ms. Clark offered to make *all* of the information obtained through discovery in the cases pending before this Court available to Rawl with an appropriate protective order. Rawl declined this offer.

the BCOA[6] and who served on the Board of Directors of the BCOA in 1978; Melvin Triolo, the Secretary/Treasurer of the Logan Coal Operator Association (LCOA) who represented LCOA as a BCOA director during the negotiations with the UMWA over the 1978 NBCWA; Nicholas Camicia, the former chairman of the Pittston Company and one of the negotiators of the 1978 NBCWA; and Stoney Barker, Jr., who was a member of the Executive Committee of the BCOA during the 1978 negotiations. Each of these affiants states that despite his participation or involvement in the 1978 negotiations, he never was apprised of the evergreen clause—in fact never even heard of it—until the Trusts began to bring these cases in the mid to late 1980s. Although Mr. Massey was a member of the Board of Directors of the BCOA, he allegedly was never asked to ratify the clause. Similarly, although Mr. Barker was on the Executive Committee of the BCOA during the relevant negotiations, he does not recall the Executive Committee ever giving the Benefits Subcommittee the authority to negotiate a continuing contributions clause. Virtually each of the five affiants attests that he believed the obligation to contribute to the Trusts would cease with the expiration of the collective bargaining agreements.[7]

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[6] These companies later merged into Rawl.

[7] By way of comparison, the Court notes that one of the declarations relied on by the Court in its Memorandum Opinion was the declaration of Roger Haynes, the chairman of the BCOA Benefits Subcommittee that negotiated the evergreen clause. Mr. Haynes averred that the evergreen clause was specifically negotiated to ensure that coal operators who voluntarily agreed to participate in the Trusts could not later walk away from their obligations at the expense of the remaining employers. *See* Mem. Op. at 15.

Additionally, the Court notes that its Memorandum Opinion relied on the congressional testimony given by Donald Pierce, a UMWA negotiator during the 1978 negotiations, when Congress was considering the Multiemployer Pension Plan Amendments Act of 1980. Only two years after the negotiations, Pierce testified before Congress that the negotiators specifically included the evergreen clause in order to keep participating employers "in the fold" and to require them to continue contributing into the future based on contributions called for in successor agreements to the NBCWA. *See* Mem. Op. at 16.

The Court's question is: why didn't Rawl submit these declarations with its opposition to the Trusts' motion for summary judgment? In that motion, the Trusts made it clear they were relying on evidence of the negotiating history of the evergreen clause to support their position. They submitted the declarations of several of the negotiators of the Trust documents. Rawl could have submitted the same declarations then that it seeks to submit today. It did not need discovery to obtain these declarations, which are hardly "newly discovered" evidence. Apparently, Rawl chose to ignore the extrinsic evidence and rely on its arguments about plain language and federal labor policy. Perhaps it was concerned that if it submitted declarations that conflicted with those submitted by the Trusts, the Court would hold that genuine issues of material fact precluded summary judgment. Only now, after the Court has rejected its other arguments, does Rawl seek to show that there are genuine issues of material fact by submitting extrinsic evidence that has been available to it since the inception of this litigation.[8] Such manipulation of the litigation process is not condoned by the Federal Rules of Civil Procedure or by this Court.

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[8] Rawl may be attempting to show more through these declarations than actually exists. None of them provide affirmative evidence of a contrary interpretation of the evergreen clause. Rather, they merely establish that several people who were in positions to know about the evergreen clause in fact did not know about the clause until the Trusts began bringing the evergreen cases. Moreover, the Trusts argue that the evergreen provision did not engender a lot of debate because it was not controversial--the negotiators were able to agree to it with little discussion.

More troubling than Rawl's "new" declarations, however, is Rawl's discovery of another case in which, after a company ceased contributing to the Trusts, the Trusts sought withdrawal liability rather than seeking to enforce the evergreen clause. Four of these cases were discussed at length in this Court's Memorandum Opinion. *See* Memorandum Opinion at 31-38. The Trusts continue to argue that this was the inadvertent result of their failure to focus on the clause until employer withdrawals began to become a problem. The case discovered by Rawl was brought by Kelley Coal against the Trusts in 1987 to contest the Trusts' assessment of withdrawal liability against the company. In that case, the Trusts took the position that Kelly had withdrawn from the Trusts in 1984 when its 1981 wage agreement providing for contribu-

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b. Improper Weighing of the Evidence

Also in support of its argument that summary judgment was inappropriate, Rawl argues that the Court improperly "weighed" the evidence before it when it concluded that the evergreen clause was intended to create a binding obligation on employers. Rawl argues that, in cases involving contract interpretation, unless the contract is wholly unambiguous, its interpretation raises a genuine issue of material fact that cannot be resolved through summary judgment.

Air Transport Ass'n of America v. Lenkin, 899 F.2d 1265 (D.C. Cir. 1990) (per curiam), sets forth the standard quite succinctly. In that case, the appellate court affirmed the district court's

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continued from previous page

tions to the 1950 Trusts expired and it did not enter into a successor agreement providing for such contributions. Kelley took the position that it had not withdrawn from the plan, but had "suspended contributions under the plan during a labor dispute involving its employees" within the meaning of ERISA. Neither party discussed or relied on the evergreen clause. The case was "administratively closed" when Kelley Coal filed a voluntary petition in bankruptcy. *See* Rawl's Motion for Reconsideration, Exhibit 4.

Also troubling is a "Q & A" on withdrawal liability that was ratified by the Trustees in August 1981. In response to the question "When does a "complete withdrawal" within the meaning of Section 4201 of ERISA occur?" the Q & A states, among other things, "where . . . (c) an employer becomes non-signatory." Attachment 2 to Rawl's Supplemental Memorandum in Support of Motion for Reconsideration. This is precisely the position taken by Rawl and the other defendant employers in these cases: that their obligations ceased when they no longer were signatories to an NBCWA or "me-too" agreement incorporating the terms of the NBCWA. The Trusts' rebuttal to this evidence is the same as their rebuttal to the withdrawal liability cases: the trustees did not participate in the negotiation of the Trust language and did not focus on it until the mid to late 80s when the withdrawal of employers from the Trusts began to be a problem.

As with the declarations, the Court is concerned about Rawl's failure to submit this evidence until after it lost its motion for summary judgment. According to the Trusts, both the *Kelley* case and the Q & A had been produced in discovery to the other defendants long before summary judgment motions were filed. Rawl was given the opportunity to examine this discovery. Its failure, apparently for strategic reasons, to withhold this evidence until now has the appearance of sandbagging and gives the Court great concern.

grant of summary judgment although the contract's language was ambiguous. The appellate court agreed with the district court "that consideration of extrinsic evidence 'emphatically supports' appellees' position." *Id.* at 1266 (citing district court opinion). It went on to state:

> At first glance, it might appear that a case involving an arguably ambiguous contract requiring consideration of extrinsic evidence for definitive resolution would be inappropriate for summary judgment. As this court has stated, however, in cases where extrinsic evidence is "so clear that it cannot fairly be said that the material issue of intent is genuinely in dispute," summary disposition is appropriate. *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 684 n. 23 (D.C. Cir. 1985).

Id. at 1266-67.

In this case, the Court concluded, after reviewing the voluminous evidence submitted by the Trusts, that the only reasonable interpretation of the evergreen clause is that it was intended to create a continuing obligation to contribute. Based on what was before the Court at the time, as well as on the parties' strenuous arguments that there were no genuine issues of material fact in dispute, the Court concluded that summary judgment was appropriate. Only after the defendants lost did they begin to argue that summary judgment was inappropriate. The Court continues to stand by its original conclusion.

3. Rawl's Affirmative Defenses

Rawl argues that the defenses of statute of limitations and laches are available and it should be given the opportunity to conduct discovery regarding these defenses in order to present them to the Court. Rawl argues that the three-year statute of limitations applicable to contract cases is applicable to this case. It also argues that the plaintiff Trusts have unreasonably delayed bringing their

claims and that this delay has prejudiced Rawl, thus barring this case based on laches. To pursue either of these defenses, Rawl argues that it will be necessary to engage in discovery.

Rawl has waived these affirmative defenses by not asserting them in its own motion for summary judgment and, more importantly, by not asserting them in its opposition to the Trusts' motion for summary judgment. If Rawl believed it needed discovery to assert these defenses, it should have asked for discovery rather than moving forward with its motion on the merits. *See Federal Deposit Insurance Corp. v. Simon*, 607 F. Supp. 1254, 1256 (D.C. Ill. 1985) (affirmative defense raised in answer abandoned due to defendant's failure to respond to plaintiff's motion for summary judgment); *Attorney General of United States v. The Irish People, Inc.*, 565 F. Supp. 114, 120 n.9 (D.D.C 1984) (noting that it appeared that defendant had abandoned its affirmative defenses because it did not raise them in its motion for summary judgment or cross motion to the plaintiff's motion for summary judgment), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C. Cir. 1986).

4. Collateral Estoppel Effect of Island Creek Cases

Rawl's fourth argument, regarding the collateral estoppel effect of Judge Harris' decision in the *Island Creek* cases, was fully analyzed in this Court's Memorandum Opinion and will not be rehashed here. Rawl has submitted no new evidence or argument requiring reconsideration of this issue.

5. Conclusion

Motions for reconsideration are not specifically provided for under the Federal Rules of Civil Procedure. The most analogous rule, however, is rule 60, which provides for relief from a final judgment or order. That rule states that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceed-

> ing for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . .

Fed. R. Civ. P. 60(b). This rule, by its terms, applies only to "final" judgments and orders. In this regard, the Advisory Committee Note states that:

> The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The Fourth and Fifth Circuits have held that a motion to reconsider an interlocutory order is not governed by rule 60(b), but is within the discretion of the trial court, subject to appellate review under the abuse of discretion standard. *See Fayetteville Investors v. Commercial Builders*, 936 F.2d 1462 (4th Cir. 1991); *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345 (5th Cir. 1989). *See also* 7 Moore's Federal Practice, ¶ 60.20 ("Interlocutory orders and judgments are not within the provisions of 60(b), but are left within the plenary power of the Court that rendered them to afford such relief from them as justice requires.").

According to the Fifth Circuit, in ruling on a motion for reconsideration, a judge must "consider judicially the record as it exists at the time of the motion for reconsideration not just as it existed at the time of the initial ruling." 888 F.2d at 349. In the *Xerox* case, a shareholder derivative suit, the trial court granted the defendant's motion for summary judgment and denied plaintiff's rule 56(f) motion for a continuance to conduct discovery to rebut the affidavits submitted with the motion to dismiss. Plaintiff filed a motion for reconsideration, supported by many documentary exhibits from a

related case. The trial court denied the motion for reconsideration and the Fifth Circuit reversed, stating as follows:

> Because these documents reflect the existence of genuine issues of material fact, the trial judge knew positively at that time that his earlier grant of summary judgment could no longer be justified. He could not turn his back on such an overwhelming showing. He was obliged to reconsider and rescind the interlocutory summary judgment order. Failure to do so constituted an abuse of discretion.

Id. at 356.

There are several facts that distinguish the *Xerox* case from the *Rawl* case. First, in *Xerox*, the plaintiff moved for a continuance in order to conduct discovery before the court ruled on the pending motion for summary judgment. In the *Rawl* case, Rawl made no such motion, even though it was obvious from the Trusts' briefs that extrinsic evidence had been submitted and relied upon. Second, in *Xerox*, the information plaintiff sought through discovery was information that could only be provided by the ex-directors of the defendant and was not in the plaintiff's possession. With its motion for reconsideration, the plaintiff was able to establish, through the submission of the ex-directors' statements in other related litigation, that discovery was necessary and was likely to produce evidence rebutting the defendants' showing. In *Rawl*, everything that Rawl has now submitted as evidence of a factual dispute has been available to Rawl all along. The affidavits submitted with its motion for reconsideration came primarily from its own employees and those of the other defendants. Rawl did not need any discovery to obtain these affidavits. The *Kelley* case and the Q & A on withdrawal liability had been produced by the Trusts well before summary judgment motions were filed. In short, none of what Rawl submits today is truly "new." Rather, it was withheld from the Court until it became useful to Rawl.

Finally, in *Xerox*, the information presented to the trial judge with the motion for reconsideration raised genuine issues of material

fact with respect to the defendant directors' breach of their fiduciary duties. In the *Rawl* case, the affidavits submitted by Rawl establish only that officials of the Rawl companies were unaware of the evergreen clause; they do not establish that the evergreen clause was not intended to create a continuing obligation to contribute.[9]

The Court is concerned about the effect of the evidence submitted by Rawl in support of its motion for reconsideration, particularly in light of the pendency of two other cases regarding the evergreen clause. Nevertheless, the Court finds this case distinguishable from the *Xerox* case, in which the failure to present relevant evidence was not the fault of the nonmoving party. In this case, the Court can conclude nothing other than that Rawl made a

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[9] The facts of the Fourth Circuit's opinion in *Fayetteville Investors* are so different from those in *Rawl* that they provide little guidance for this Court. In that case, the trial court denied reconsideration of a motion to dismiss primarily because the plaintiff submitted evidence without explaining why that evidence had not been submitted in its opposition to the defendant's motion to dismiss. The appellate court's reversal of the trial court's denial of reconsideration was based on the fact that it is not the plaintiff's burden, in opposing a motion to dismiss under rule 12(b)(6), to come forward with all of the facts of the case. The appellate court specifically noted that the parties had acknowledged on the record that they did not seek to convert the 12(b)(6) motion into a summary judgment motion. The appellate court did not indicate whether the trial court's denial of reconsideration would have been appropriate had the motion been for summary judgment and had the plaintiff still failed to come forward with rebuttal facts and affidavits until moving for reconsideration.

Assuming that the result would have been different had the motion been for summary judgment rather than to dismiss, this Court is in full agreement with the trial court's rationale for denying reconsideration:

> A party should not be permitted to use a motion to reconsider as a vehicle to introduce additional evidence which could have been adduced during the pendency of the prior motion. . . . Dispositive motions serve judicial economy by encouraging parties to winnow out extraneous issues. To compel their cooperation in this process, litigants face the dismissal of claims which are not adequately supported by the early and full disclosure of all material facts. This system is compromised if courts allow litigants to control the time at which evidence will be produced.

936 F.2d at 1470 (quoting the trial court's order).

decision, as part of its litigation strategy, to withhold its own evidence of negotiating history and base its entire argument for summary judgment on plain language and federal labor policy. That Rawl was somehow "denied" discovery is a red herring—Rawl did not need any discovery to come up with what it has now submitted. If Rawl's tactics are to be condoned, it will render the strictures of rule 56 meaningless. Litigants will be free to put forth only the arguments that they think will result in summary judgment in their favor. Then, if that tactic fails, they will fall back on their withheld evidence to show the existence of material facts. Rawl wants to have its cake and eat it too. The Court will not allow this. Accordingly, the Court shall deny Rawl's Motion for Reconsideration.

B. Motion to Amend and Certify for Interlocutory Appeal

Pittston's Motion for Amendment seeks three things: (1) an amendment of the January 31, 1992 Memorandum Opinion and Order certifying this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b); (2) an amendment clarifying that summary judgment was not entered against Thames Development, Ltd. (Thames) and The Pittston Company (The Pittston Company is the parent of the numerous defendant coal operators, referred to in the Memorandum Opinion and herein as the PCG Companies); and (3) to dismiss the complaint against Thames and Pittston.

1. Motion for Interlocutory Appeal

Pittston's arguments in support of an immediate interlocutory appeal are essentially the same as those made by Rawl in support of its Motion for Reconsideration.[10] Pittston argues that: (1) it is entitled to discovery to rebut the Trusts' evidence of negotiating history; (2) there are genuine issues of material fact; and (3) the Trusts should be barred by collateral estoppel. Like Rawl, Pittston

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[10] At oral argument, counsel for Rawl represented that if its Motion for Reconsideration was denied, it joined with Pittston in seeking an interlocutory appeal.

has now come up with two declarations—that have been available since the inception of this litigation—allegedly supporting its position. These declarations are made by Joseph Farrell, the current Chairman and C.E.O. of Pittston who has been with the company since 1984, and by Paul Douglas, the former Chairman and C.E.O. of Pittston from 1984 to 1991. Both state that they never knew that companies who withdrew from the NBCWA would nonetheless be required to continue to contribute to the Trusts at the rates negotiated between the BCOA and the UMWA. Mr. Douglas states that, had the PCG Companies known of this obligation when they decided to withdraw from the BCOA and negotiate their own agreements with the Union, they probably would not have proceeded as they did.

Interlocutory review is governed by 28 U.S.C. § 1292(b), which provides, in pertinent part, that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The Trusts argue that such a certification is for use only in exceptional cases. *See Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984). The Court does not take issue with this statement of the law; rather, the Court believes these are precisely the type of exceptional cases for which interlocutory appeal is appropriate. Among the "controlling question[s] of law as to which there [are] substantial ground[s] for difference of opinion" are: (1) whether the plain meaning of the evergreen clause should have governed the Court's decision; (2) whether the extrinsic evidence considered by the Court raised genuine issues of material fact; (3) whether federal labor law prohibits the Court's interpretation of the evergreen clause to create a continuing contribution; (4) whether the Trusts were collaterally or judicially estopped from bringing

these cases under the evergreen clause; and (5) whether this Court is in error by denying Rawl's motion for reconsideration on the grounds that it strategically withheld information that was available to it at the time it filed its opposition to the Trusts' motion for summary judgment. The sheer volume of the briefs, the number of attorneys involved, and the obvious interest to the public attest to the substantial differences of opinion engendered by each of these issues. The interpretation of the evergreen clause has such far-reaching consequences for the coal industry, the Union, and federal labor law, that an expedited and final resolution of its meaning is imperative.

The Trusts and the BCOA argue vehemently that certifying this case for interlocutory appeal will not "materially advance the ultimate termination of the litigation" because all that is left is to collect the information regarding hours worked and coal produced and calculate the amount of delinquent contributions owed. The only issue for which the Trusts anticipate further briefing is the appropriate contribution rate, which is contested.

The Trusts are obviously ignoring the protracted history of this litigation in arguing that it is near a final resolution. As much paper has been filed post-summary judgment as presummary judgment and a discovery dispute has already arisen over collecting the information regarding hours worked and coal produced. In the Court's eyes, it is clear that these cases are still a far cry from final judgment and that, if the Court's legal conclusions on liability are not upheld, the time and money spent calculating the amount of contributions due will have been wasted.[11]

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[11] The Court is reminded of the magnitude of these cases by the pendency of two somewhat related cases before Judge Jackson of this district. These cases, which involve the "guarantee clause" of the Trusts, have been reviewed by the Court of Appeals on four occasions and still remain before the trial court. *See UMWA 1950 Benefit Plan and Trust, et al. v. BCOA*, No. 89-1744 (D.D.C.); *UMWA 1974 Benefit Plan and Trust, et al. v. BCOA*, 90-0674. Additionally, a related case is currently pending in the Western District of Virginia. In that case, a class of retired miners has sought to enjoin the Trusts, pursuant to the "suspension clause," from suspending benefits under the 1974 and 1950 Benefit Plans. *See John Doe v. Connors*, No. 92-0022A (W.D. Va.).

For these reasons,[12] the Court will grant Pittston's motion to the extent that it seeks an amendment of the January 31, 1992 Order certifying this case for interlocutory appeal. The Court will also stay the proceedings in these and the related cases pending the outcome of the appeal. The Court encourages the parties to ask for an expedited appeal and argument because of the dire financial situation of the Trusts at this time as well as the impact any ruling will have on the related litigation and further collective bargaining between the Union and the defendants.

2. Amending the Order as to Thames and Pittston and Dismissing these Defendants

The Trusts concede that the January 31, 1992 Memorandum Opinion and Order should be amended to clarify that it does not apply to Thames and the Pittston Company (the parent companies). Neither of these companies was a signatory to the 1984 NBCWA. Thus, the Court shall amend its Order to reflect that it does not apply to either Thames or the Pittston Company. The Court shall withhold ruling on the dismissal of these defendants pending the interlocutory appeal of these cases.

CONCLUSION

For all of the foregoing reasons, the Court shall deny Rawl's Motion for Reconsideration and shall grant in part Pittston's Motion for Amendment of this Court's January 31, 1992 Order.

Dated: April 29, 1992

Thomas F. Hogan
United States District Judge

[12] The Court has also considered the pendency of the appeal of the *Island Creek* cases, which may be dispositive of these cases.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 88-969
	)	MDL No. 886
THE PITTSTON COMPANY, *et al.*,	)	
Defendants	)	
UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST, *et al.*,	)	
Plaintiffs	)	
v.	)	Civil Action No. 91-3241
	)	MDL No. 886
RAWL SALES AND PROCESSING CO.,	)	
Defendant	)	

ORDER

In accordance with the Memorandum Opinion issued herewith and for the reasons stated therein, it is this 29th day of April, 1992,

ORDERED that the motion of Rawl Sales and Processing Co. for reconsideration of this Court's January 31, 1992 Memorandum Opinion and Order is hereby denied; and it is

FURTHER ORDERED that the motion of The Pittston Company, *et al.*, for an amendment of the Court's January 31, 1992 Order is hereby granted in part; and it is

FURTHER ORDERED that the Court's January 31, 1992 Order is hereby amended as follows:

It is FURTHER ORDERED that these cases are hereby certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that the terms of this Memorandum Opinion and Order shall not apply to Thames Development, Ltd. and The Pittston Company.

And it is FURTHER ORDERED that all proceedings in these cases, including the plaintiffs' pending motion for a preliminary injunction, shall be stayed pending the interlocutory appeal.

Thomas F. Hogan
United States District Judge

United States Court of Appeals
For The District of Columbia Circuit

No. 92-7141

September Term, 1992
CV 88-0969
CV 91-3241

United Mine Workers of America
1974 Pension, et al.,

v.

Pittston Company, et al.

Appellants

and Consolidated Case No. 92-7142

BEFORE: Edwards, Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of the Pittston Company (Pittston) and Rawl Sales and Processing Company, and of the March 12, 1993 letter submitted by Pittston, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

March 31, 1993

United States Court of Appeals
For The District of Columbia Circuit

No. 92-7141

September Term, 1992
CV 88-0969
CV 91-3241

United Mine Workers of America
1974 Pension, et al.,

v.

Pittston Company, et al.

Appellants

---

and Consolidated Case No. 92-7142

BEFORE:Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

The Suggestions For Rehearing *En Banc* of the Pittston Company (Pittston) and Rawl Sales and Processing Company, and the March 12, 1993 letter submitted by Pittston, have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

March 31, 1993

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RAWL SALES AND PROCESSING COMPANY,
Petitioner,
v.
TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1775

RAWL SALES AND PROCESSING COMPANY,
Petitioner,

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

The petition states three questions for review, two of which petitioner did not deem of sufficient importance to raise in the Court of Appeals. In addition, two of the three questions in the petition are premised on petitioner's assertion that the evergreen clause, the unique collectively-bargained provision at issue here, was a waiver of petitioner's statutory right to bargain. That premise was rejected—unremarkably—by the Court of Appeals, which correctly held that the evergreen clause was an *exercise*, not a waiver, of petitioner's right to bargain. The remaining question presented is entirely disposed of by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The judgment of the Court of Appeals in petitioner's interlocutory appeal implicates no important

issue of federal law, and no issue of federal law on which the circuit courts of appeals have adopted conflicting positions. *Certiorari* should be denied.

STATEMENT OF THE CASE

1. The respondents in this case are four multiemployer benefit trusts which provide pension and health benefits to retired and disabled coal miners and their families (hereafter "Trusts"). The Trusts brought this action to enforce a provision in the governing plan and trust documents known as the "evergreen" clause.[1]

The evergreen clause was first added to the plan and trust agreements governing the Trusts in 1978, through collective bargaining between the Bituminous Coal Operators' Association ("BCOA"), a multiemployer association of coal companies, and the United Mine Workers of America ("UMWA"). At that time, the Trusts had massive unfunded liabilities. The BCOA was strongly concerned that, in the future, many contributing employers might continue to operate in the bituminous coal industry, but attempt to escape their share of this future cost liability by negotiating cut-rate contributions or by ceasing

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[1] Effective February 1, 1993, while this case was pending in the Court of Appeals, the two respondent health benefit Trusts were merged into the United Mine Workers of America Combined Benefit Trust, an entity whose creation was mandated by the Coal Industry Retiree Health Benefit Act of 1992. *See* Subtitle C of the Energy Policy Act of 1992, H.R. 776, 102d Cong., 2d Sess. (1992). At an appropriate time, the Trusts will file in the district court a motion requesting that the court substitute the Combined Benefit Trust for the plaintiff health benefit Trusts.

That 1992 Act is designed to secure the future funding of the health benefits that were provided by two of the four respondent Trusts. Although the Act does not affect the Trusts' claims against Rawl and other employers for the period prior to February 1, 1993, funding for the health benefits that were provided by those two Trusts will be provided after February 1, 1993, through statutory premiums rather than contractual contributions under future National Bituminous Coal Wage Agreements ("NBCWAs").

all contributions.[2] If any employer succeeded in doing so, its share of the Trusts' benefit costs would fall on the remaining employers, even though its former employees would continue to receive full benefits from the Trusts.[3] The result would imperil the future funding of these benefits.

In response to the BCOA's concern, the UMWA agreed to place provisions in the plan and trust documents that would bind all employers participating in the Trusts, and that would prevent individual employers from negotiating cut-rates or from pulling out of the Trusts. The evergreen clause was the principal provision added for this purpose.

This is the evergreen clause that was part of Rawl's agreement in 1981:

> Any employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1950 Pension Plan, or any Em-

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[2] At all times, contributions to the Trusts have been based on hours worked in jobs covered by the NBCWA or on tons of coal produced; thus, only employers which continue to operate in the bituminous coal industry incur a contribution obligation to the Trusts.

[3] The reason for this is rooted in the unique nature of the coal industry. "The continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers retirement benefits without linking specific workers to specific employers. They have done this through national, multi-employer agreements between the [UMWA and the BCOA]. All coal companies that join the agreements pay into the same health and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds without reference to the employers they happened to be working for at the time of their retirement." *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992). A retired miner also continues to receive benefits from the multiemployer Trusts if his former employer goes out of business or stops contributing; such "orphans" make up about half of the current beneficiaries of two of the Trusts.

> ployer who was or is required to make, or who has made or makes contributions to the 1950 Pension Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Pension Plan and Trust, as amended from time to time, including, but not limited to, *making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including but not limited to, the National Bituminous Coal Wage Agreement of 1981.* [Emphasis supplied] [4]

In the words of the Court of Appeals, the evergreen clause provided "that participating employers . . . were bound to make continuing contributions to the trusts, and that the amounts of contribution would be as specified in future NBCWAs," which are the master agreements for the bituminous coal industry negotiated by the BCOA and the UMWA. 984 F.2d 469, 472.

After its 1981 agreement expired on September 30, 1984, Rawl withdrew from the BCOA. Although Rawl continued to operate in the bituminous coal industry, it did not make contributions to the Trusts at the rates required under either the 1984 NBCWA or the 1988 NBCWA. Instead, Rawl negotiated an agreement with the UMWA which purported to allow Rawl to contribute to the Trusts at cut-rates during a portion of the term of the 1984 NBCWA and then to eliminate Rawl's contribution obligation entirely as of January 31, 1988.

2. The Trusts sued Rawl to collect contributions at the uniform national rates. The District Court granted the Trusts' motion for summary judgment on issues of lia-

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[4] The evergreen clause quoted in text appeared in the 1981 governing documents of the 1950 Pension Trust. Identical language, with appropriate changes in the name of the Trust, appeared in the governing documents of each of the other three Trusts. In the trust documents for other years, the date in the final phrase of the evergreen clause was different: it always referred to the then-current NBCWA.

bility. The court observed that the Trusts' extrinsic evidence of the intent of the evergreen clause was "voluminous and persuasive," and "made an extremely persuasive showing regarding the intent of the evergreen clause." App. 33, 35. The court rejected Rawl's argument that enforcement of the evergreen clause would violate federal labor policy and its argument that Rawl had not clearly and unmistakably waived its statutory right to bargain with the UMWA over pension and health benefits issues. App. 38-43.

Rawl then moved for reconsideration of the District Court's decision. The District Court denied the motion, but amended its order to allow an interlocutory appeal under 28 U.S.C. § 1292(b).[5]

3. Rawl appealed. The D.C. Circuit affirmed the decision of the District Court granting summary judgment to the Trusts, and remanded for completion of the district court proceedings.[6] The court stated that the "language of the relevant provisions in the applicable trust and collective bargaining agreements unambiguously obliges signatory employers to contribute to the trusts at the rates specified in the current NBCWA, irrespective of the employer's failure [to] sign that NBCWA." 984 F.2d at 473. The court further held that this interpretation of the clause was "corroborated by voluminous extrinsic evidence submitted by the Trustees," *id.* at 474.[7]

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[5] The order granting summary judgment was interlocutory because it did not determine the amount of Rawl's liability to the Trusts.

[6] Petitioner's appeal was consolidated with an appeal from the district court's order of summary judgment enforcing the evergreen clause against certain coal subsidiaries of The Pittston Company, *see United Mine Workers of America 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993). The Court of Appeals' judgment was the same in both cases.

[7] Rawl asserts that "Rawl *and* the Union, as *amicus*, urged the *courts* below" to refuse enforcement of the evergreen clause. *See* Petition at 9 (emphasis supplied). The UMWA did support Rawl

Rawl did not argue in the Court of Appeals either that a "perpetual waiver of the right to bargain . . . should not be permitted as a matter of national labor policy," *see* Petition at 12, or that "a multi-employer bargaining association should not be permitted to waive in perpetuity the statutory rights of its members," *see* Petition at 19, although these are the first two issues presented in its petition for certiorari.[8] The D.C. Circuit did not address these issues.

The court did reject Rawl's argument that the evergreen clause constitutes a "waiver" of bargaining rights which must be "clear and unmistakable" to be enforced. The court held that:

> "[T]o the extent that a bargain resolves any issues, it removes that issue *pro tanto* from the range of bargaining." Here, the UMWA and the BCOA agreed on a basis for determining the employers' pension fund contributions. When [Rawl and other employers] signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against [Rawl]. There is no issue of waiver in this case. [984 F.2d at 479 (citation omitted).]

REASONS THAT THE PETITION SHOULD BE DENIED

This evergreen clause exists only in the unionized sector of the bituminous coal industry. We know of no other industry in which employers and unions have agreed to assure the long-term funding of retiree benefits through a similar contractual provision. Moreover, apart from the unique character of the clause, none of the three

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in the district court, but did not participate in the proceedings before the Court of Appeals.

[8] These issues were not raised by any party to the appeal. The second of these issues was raised briefly in one of several *amicus* briefs filed before the D.C. Circuit—that of Island Creek Corp., *et al.*

questions stated in the Petition presents an issue of importance for this Court's review.

I. THE ALLEGED WAIVER OF RAWL'S STATUTORY RIGHT TO BARGAIN (QUESTIONS 1 AND 3 OF THE PETITION)

Questions 1 and 3 of the petition inquire, respectively, (a) whether the evergreen clause, as a perpetual waiver of Rawl's statutory right to bargain, is unenforceable under federal labor law; and (b) whether, assuming the evergreen clause is an enforceable perpetual waiver, it must be "clear and unmistakable," *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983).

A. Question 1 was not raised in the Court of Appeals. The Court of Appeals, accordingly, did not decide it. There is no reason for this Court to reach out and decide that question.[9]

B. Another fundamental flaw of Questions 1 and 3 is that their premise—that the evergreen clause is a *waiver*—is false. In a long line of decisions, the D.C. Circuit has warned against confusing a *waiver* of statutory rights—which occurs when a party knowingly and voluntarily relinquishes its right to bargain about a matter—with an *agreement* that "fixes the parties' rights and forecloses further mandatory bargaining." *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).[10]

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[9] *See, e.g., Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) (the "claim was not passed on by the Court of Appeals—nor does it appear to have been presented to that court as a distinct ground for its decision. Thus, we will not consider it here") (citation omitted); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the Court of Appeals and is not properly before us"); *EEOC v. FLRA*, 476 U.S. 19, 26 (1986) (same).

The subsidiary arguments to Question 1, which appear at pages 15-18 of the petition, likewise were not presented to, or decided by, the Court of Appeals.

[10] *See also Connors v. Link Coal Co., supra*, 970 F.2d at 905; *Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992);

Where the parties to a collective bargaining agreement have agreed on rules that will govern their conduct, they have *exercised* their bargaining rights as to those rules, and the legal standards for finding a waiver of bargaining rights do not apply. As the Court of Appeals fully explained in *Dept. of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992): "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain over a matter; but where the matter is covered by a collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant." (Emphasis in original). *Accord, Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (" 'where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather, the contract will control' ") (quoting *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991)).

The essence of Rawl's argument that the Court of Appeals was wrong in concluding that the evergreen clause is not a waiver appears to be as follows: The evergreen clause is a "perpetual" obligation whose precise economic dimensions are unknown; such a lengthy and uncertain commitment must be deemed a waiver of bargaining rights, rather than a contractual obligation. *See* Petition at 12-13.

Rawl's position is untenable. Initially, we note that, while the Court of Appeals did not take issue with Rawl's contention that the evergreen obligation was perpetual, 984 F.2d at 474, it is not. The evergreen obligation continues as long as—but *only* as long as—the BCOA and the UMWA set national contribution rates for the Trusts.[11]

United Mine Workers of Am., Dist. 31 v. NLRB, 879 F.2d 939, 943-44 (D.C. Cir. 1989).

[11] If a contract is "terminable upon the occurrence of some event," it is not an indefinite contract terminable at will by either party. *E.g., First Commodity Traders, Inc. v. Heinold Commodities, Inc.*,

In addition, the precise extent of the evergreen obligation is pegged to the contribution rates agreed to in future NBCWAs. The use of a general industry standard for uniform contribution rates for multiemployer benefit plans is akin to pegging economic terms to the consumer price index or other national or local standards—an entirely commonplace provision in collective bargaining agreements.[12]

We are aware of no authority supporting the proposition that a contractual obligation of this nature is unenforceable or that it constitutes a waiver of bargaining rights. Instead, there are numerous cases in which courts have enforced employers' collectively-bargained obligations to provide retirees with lifetime pension and health benefits—obligations as long-term and potentially open-ended as those created by the evergreen clause.[13]

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766 F.2d 1007, 1012 (7th Cir. 1985); *Payroll Express Corp. v. Aetna Casualty & Sur. Co.*, 659 F.2d 285, 291 (2d Cir. 1981).

In addition, legislation enacted in 1992 has replaced the contractual obligation arising from the evergreen clause with a statutory obligation to fund benefits that were previously provided by two of the four Trusts. *See* note 1, *supra*.

[12] Rawl's innuendo that the BCOA is attempting to gain a competitive edge over non-BCOA coal companies by "setting higher contribution rates applicable to non-BCOA members or from negotiating improved benefits only for employees of active BCOA members," Petition at 14 & n.6, is baseless. In support of its assertion, Rawl cited a fragment of the 1991 BCOA/UMWA reopener agreement; the remainder of the document—not in the record—clearly provides that *any* contributing employer—not just any BCOA member—which accepted the reopener settlement negotiated by BCOA and the UMWA could shift its liability for retirees' death benefits to the Trusts.

[13] *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). The evergreen clause is unique in that employers undertake a long-term obligation to make specified

In brief, Rawl's agreement to contribute to the Trusts at the uniform rate set through national agreements involved the exercise, rather than the waiver, of its right to bargain. And the arguments Rawl now makes in support of its contention that enforcement of this agreement would violate the federal labor policy were not presented to, or decided by, the Court of Appeals. Thus, Questions 1 and 3 of the petition do not merit this Court's review.

C. Rawl's effort to manufacture a conflict among the circuits with respect to Question 3 of the Petition is also unavailing. There is no conflict among the circuits with respect to whether the D.C. Circuit's sensible distinction between a waiver and an exercise of bargaining rights is correct. The D.C. Circuit and the Seventh Circuit are the only circuits that have addressed this question directly, and they are in accord. *See supra* at 8.[14]

The law in the Sixth Circuit is not to the contrary. In *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585 (6th Cir. 1986), discussed at length in the petition, the collective bargaining agreement obligated the employer to continue pension payments for 90 days after termination of the agreement. Without bargaining with the union, the employer terminated the payments *after* 90 days. Thus, the question in *General Tire* was whether a party had waived its right to bargain *after* the contractual obligation to make payments had *expired*; that situation is a far cry

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contributions while, in most industries, employers enter into long-term contractual commitments to provide specified *benefits*. But there is no reason that federal labor policy would approve enforcement of the latter while making the former unlawful.

[14] The Eleventh Circuit, too, has noted that the question whether a party has "waived" its right to bargain about an issue is entirely distinct from the question whether an issue is "covered" by a collective bargaining agreement. *See Mead Corp. v. NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983).

from this case, in which Rawl has an ongoing, effective contractual obligation to contribute to the Trusts.

In any event, even if Rawl were correct—which it is not—that the evergreen clause waives bargaining rights and that there is a conflict among the circuits with regard to the applicable standard for determining whether a waiver has occurred, this case would not merit the Court's review. The record of this case plainly demonstrates that Rawl's alleged waiver of its statutory bargaining rights was "clear and unmistakable." *E.g.*, 984 F.2d at 475-76 ("the Trustees provided the District Court with a compelling argument and specific evidence indicating that theirs was the only reasonable interpretation of the evergreen clause and that no material factual dispute remained for trial"). Thus, the result in this case would not change even if this standard were applied, and this case does not genuinely present the question of whether the "clear and unmistakable waiver" standard must be applied.

II. THE ALLEGED WAIVER OF RAWL'S STATUTORY RIGHT TO WITHDRAW FROM MULTIEMPLOYER BARGAINING (QUESTION 2)

Although phrased in terms of waiver, the remaining question presented in the petition is whether the evergreen clause coerces Rawl in the selection of its bargaining representative by compelling it to bargain through a multiemployer association (BCOA), contrary to section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B).

The Court should not exercise its discretion to review this question, which no party raised in the Court of Appeals, and which the Court of Appeals did not address.[15]

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[15] As noted above, one of the *amici* in the Court of Appeals raised this issue briefly. The D.C. Circuit, like this Court, apparently did not consider itself required to address an issue raised only by an *amicus curiae*, *see United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

In any event, this question does not merit this Court's review. It is fully disposed of by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). In *Amax*, a case involving the same multiemployer funds as those at issue here, the Court rejected employer arguments that are closely analogous to those respondent makes here. The employer argued that when the UMWA went on strike over a demand that the employer agree to participate in these multiemployer funds, it violated the Section 8(b)(1)(B) prohibition against "coerc[ion of] . . . an employer in the selection of his representatives for the purposes of collective bargaining," 29 U.S.C. § 158 (b)(1)(B). *See* 453 U.S. at 326-27. This Court rejected that contention, explaining that participation in a multiemployer trust fund is not the same thing as participation in multiemployer bargaining. *Id.* at 334-38. The Court concluded that very different federal labor policies apply in the two contexts:

> Congress enacted § 8(b)(1)(B) largely to prevent unions from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or the settlement of employee grievances. . . . *However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly.* It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industrywide employer association, while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Id. at 334-35 (emphasis supplied).

If union pressure to contribute to a multiemployer trust does not constitute pressure to join or continue multi-

employer bargaining, it necessarily follows that the contract binding petitioner to continue to participate in a multiemployer trust is not equivalent to a perpetual designation of BCOA as its agent for multiemployer bargaining or a waiver of petitioner's right to negotiate separately. For that reason, again, even if this question had been addressed by the Court of Appeals, it would not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1775

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAWL SALES AND PROCESSING COMPANY, PETITIONER

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly determined that the "evergreen clause" to which petitioner agreed in the National Bituminous Coal Wage Agreements ("NBCWAs") of 1978 and 1981 requires petitioner (and other similarly situated employers) to continue contributions to the respondent multiemployer pension and health plans for as long as successor NBCWAs require such contributions.

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted by the Bituminous Coal Operators' Association, Inc. ("BCOA"), as *amicus curiae* in support of respondents.[1]

INTEREST OF BCOA AS AMICUS CURIAE

BCOA is a multiemployer collective bargaining association that, for more than forty years, has represented numerous large and small coal companies in negotiations with the United Mine Workers of America ("UMWA" or "the Union"). The collective bargaining agreements re-

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

sulting from these negotiations are known as National Bituminous Coal Wage Agreements ("NBCWAs"). Each NBCWA establishes the terms and conditions of employment for the production employees of BCOA's member companies and for thousands of unionized employees working under "me-too" agreements between the UMWA and the non-BCOA member companies.[2] The contractual provisions at issue in this case were negotiated by BCOA and the UMWA as part of the NBCWA of 1978, and they were retained in the NBCWAs of 1981, 1984, and 1988.

BCOA and the UMWA are also the settlors of four employee benefit trusts that provide health and pension benefits to more than 120,000 retired coal miners and their dependents. These multiemployer trusts (two of which provide health benefits and two of which provide pension benefits) are known collectively as the UMWA Health and Retirement Funds ("the Funds"). In the context of NBCWA negotiations, BCOA and the UMWA established the structure of the Funds, the language of the trust documents, the level of benefits provided by the Funds, and the level of employer contributions necessary to fund those benefits. Respondents in this case are the Funds' Trustees.

As a result of the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036 (the "Coal Act"), the two health benefit funds (the 1950 Benefit Trust and the 1974 Benefit Trust) have been merged into a new, statutorily created fund called the UMWA Combined Benefit Fund (the "Combined Fund"). The Coal Act also created another multiemployer health fund for retired miners, the UMWA

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[2] In a "me-too" agreement, a non-BCOA employer agrees to be bound by the terms of the agreement negotiated by BCOA and the UMWA. *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992).

1992 Benefit Plan (the "1992 Plan").[3] In the Coal Act, Congress recognized the central role that BCOA and the UMWA have played in the Funds, and ensured that that role would continue. Among other things, the Coal Act designates BCOA and the UMWA as the settlors of the 1992 Plan, and gives BCOA and the UMWA authority to appoint Trustees to the 1992 Plan and the Combined Fund.

As a settlor of the Funds and a negotiator of the trust documents at issue in this case, BCOA has an interest in ensuring that the requirements of the trust documents are honored and enforced. In addition, BCOA member companies have a strong economic interest in this litigation. Due to the failure of petitioner and other employers to make contractually mandated contributions to the Funds, the two health benefit trusts now merged into the Combined Fund had reportedly amassed a deficit of approximately $60 million as of February 1, 1993. Under Section 9704(i)(1)(B) of the Coal Act, 106 Stat. 3045, if this deficit is not eliminated through other collections, such as the recovery of delinquent contributions from employers like petitioner, it must be eliminated by signatories to the 1988 NBCWA, including BCOA member companies. Accordingly, vindication of the contractual obligations at issue in this case—and the resulting payment of the amount owed by the petitioner to the benefit trusts—will reduce on a dollar-for-dollar basis the amounts that the Combined Fund Trustees will seek to collect from BCOA members and other signatory employers.

Although BCOA agrees with and supports the position of the respondent Trustees in this case, BCOA's interests

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[3] The 1992 Plan, which has no direct involvement in the present case, provides health care for retirees who meet the statutory eligibility criteria but were not already eligible for and receiving benefits from the 1950 Benefit Trust or the 1974 Benefit Trust as of July 20, 1992.

are not adequately represented by the Trustees. The Trustees are obligated by law to act in the sole and exclusive interest of the Funds' beneficiaries, and cannot represent the interests of employers such as BCOA members. *See* 29 U.S.C. § 1104(a) (fiduciary duty to act "solely in the interest of the participants and beneficiaries").

For all of these reasons, BCOA has been permitted to participate as an *amicus curiae* in this case in both the district court and the court of appeals, to present the viewpoint of the party that negotiated the "evergreen clause" (the key contractual provision at issue) and the viewpoint of the employers that, but for the enforcement of the evergreen clause, would have to pay for petitioner's contractual breaches. As shown in greater detail below, the evergreen clause was designed to prevent this very situation from occurring.

STATEMENT OF THE CASE

Petitioner's statement of the case grossly distorts the facts and ignores the historical context in which this dispute arose. To place this case in proper context, we summarize below the salient factual background on which the court of appeals relied.

The design of the Funds at issue in this case is attributable to peculiarities in the structure of the coal industry itself. As the D.C. Circuit has explained in a previous case, "[t]he continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers' retirement benefits without linking specific workers with specific employers. They have done this through national, multiemployer agreements . . . . All coal companies that join the agreements pay into the same health

and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds without reference to the employers they happened to be working for at the time of their retirement." *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992).

The "evergreen clause" was negotiated in 1978 in response to the concern of BCOA members that some of the coal companies then participating in the multiemployer plans might simply walk away from their pension and health benefit obligations and leave their unfunded, vested liabilities behind, to be borne by other contributors to the multiemployer funds. These concerns became acute during the term of the 1974 NBCWA. Because contributions to the Funds were pegged to the amount of coal produced, a series of wildcat stirkes during the term of the 1974 NBCWA resulted in a dramatic reduction in contributions to the Funds. The Trustees were forced to reduce benefit payments substantially. Then, in December 1977, the 1974 NBCWA expired and the UMWA called a nationwide strike. All contributions to the Funds ceased, and the Trustees suspended benefits altogether.

As negotiations for a successor NBCWA proceeded and the strike continued, BCOA and the Union realized that modifications to the Funds' contribution scheme were necessary. Specifically, the parties recognized that they needed to negotiate an industry-wide solution to the problem of so-called "orphan" retirees, *i.e.*, workers who had retired from an employer no longer mining coal and thus no longer making contributions to the Funds from which the retirees received their benefits. Moreover, by early 1978, the two pension funds had accumulated a staggering *$6 billion* in unfunded, vested liability. Because there were no contractual or statutory impediments to employer withdrawals from the Funds at the time, BCOA realized that, unless something was done, coal operators could

walk away from the multiemployer funds and leave their beneficiaries behind to receive benefits paid for by their competitors.[4] This scenario was referred to during the negotiations as the "last man's club," where the last company to exit the Funds would be left to pay the pension and retiree health care costs of all of its industry competitors. *See, e.g.*, Pet. App. 34.

The evergreen clause was the collectively bargained solution to these problems. BCOA and the UMWA agreed to the evergreen clause during the 1978 NBCWA negotiations, and placed the clause in the trust documents for the Funds, which are incorporated by reference into the contract. The evergreen clause as negotiated in 1978 provided:

> Any employer who employed any participant eligible for coverage under, or who received or receives benefits under, [the Funds], or any Employer who was or is required to make, or who has made or makes contributions to the [Funds], *is obligated and required to comply* with the terms and conditions of the [Funds], as amended from time to time, including, but not limited to, *making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto.* [emphasis added]

The evergreen clause thus required all employers participating in the Funds, either pursuant to the 1978 NBCWA or as a result of a "me-too" agreement with the UMWA, to continue contributing to the Funds throughout the term of the 1978 NBCWA *and*

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[4] Congress did not pass the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381, until 1980. The MPPAA, for the first time, imposed a statutory obligation on employers withdrawing from a multiemployer pension plan to contribute an actuarially-determined "withdrawal liability" payment to fund their pro-rata share of the plan's unfunded pension liability.

any successor NBCWA, at the rates required by those Agreements.

The evergreen clause was agreed to in 1978 because it served the interests of both management and labor. For the Union, the evergreen clause provided a steady stream of income to the Funds at the uniform rate set in national bargaining. This stabilized the financial condition of the Funds and reduced the pressure on the Union for special deals or cut-rate contributions. Moreover, the actuarial viability of the Funds was, and still is, extremely important to the Union. The Funds provide a uniform level of benefits to approximately 120,000 retired coal miners and their dependents, most of whom are from families that have worked in the mines for generations. *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992). The Funds also have been of significant political value to the Union because the UMWA, unlike other unions, gives retirees full voting rights in Union elections and retirees outnumber active miners by more than two to one.

For employers, the evergreen clause provided mutual assurances, with the full concurrence of the Union, that all employers would share equally the substantial financial burden of the Funds, and it ensured that no employer or group of employers could obtain an economic advantage over the others by leaving the multiemployer structure and negotiating a lower contribution rate. The clause was, in other words, a *collective commitment* among employers that was placed in the trust documents and thus could not be changed by a single employer or group of employers acting on their own, even if they managed to obtain the concurrence of the Union. The clause provided a level playing field for all employers participating in the Funds, and it was designed to ensure that the field stayed that way. As stated by BCOA's chief benefits negotiator, the evergreen clause "was agreed to in the context of all participating employers saying to the UMWA *and to each other* that they were all in this together, and it was

all for one and one for all." J.A. 650-51 (emphasis added); *see also* J.A. 649, noting that "[t]he UMWA agreed to include such a provision, without any real objection, because as I understood it the UMWA was then in total agreement with the objective of equal treatment for all contributing employers in respect to both benefits and contributions." [5]

Because the evergreen clause served the interests of all concerned, it was agreed to by BCOA and the UMWA with little or no controversy. Significantly, at the time the evergreen clause was first negotiated, petitioner was a member of BCOA.[6] Petitioner authorized BCOA to serve as its bargaining representative in the 1978 negotiations, voted to ratify the agreement negotiated by BCOA (the 1978 NBCWA), and became signatory to this Agreement. Petitioner then remained in BCOA throughout the term of the 1978 NBCWA, authorized BCOA to bargain on its behalf for a successor agreement (the 1981 NBCWA), and became signatory to the 1981 NBCWA as well. The evergreen clause was retained in the 1981 NBCWA, and it has been carried forward in each successor agreement negotiated since that time—*i.e.*, the NBCWAs of 1984 and 1988.

In 1984, however, Rawl attempted precisely the liability-dumping scheme that the evergreen clause was intended to prevent. When the 1981 NBCWA expired, Rawl withdrew from BCOA, terminated its contributions to the Funds, and hunkered down for a protracted battle with its employees and the UMWA. During this period,

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[5] "J.A." refers to the parties' joint appendix in the court of appeals.

[6] Petitioner Rawl Sales & Processing Co. is a wholly-owned subsidiary of the A.T. Massey Coal Company. Rawl is a successor to several other subsidiaries of A.T. Massey that were members of BCOA in 1978 when the evergreen clause was first negotiated. Petitioner does not deny that it then became bound to the NBCWAs of 1978 and 1981.

Rawl did not make any contributions to the Funds, but its retirees continued to receive full and uninterrupted health and pension benefits paid for by the contributions of the remaining employers.

Finally, in 1988, after a long and acrimonious strike, the Union was forced to capitulate, and it accepted the terms of Rawl's final contract offer. Rawl thus succeeded in foisting upon the Union a sweetheart deal that purported to reduce drastically, and ultimately eliminate altogether, Rawl's obligation to contribute to the Funds, notwithstanding the fact that its retirees would remain entitled to undiminished benefits from those Funds, financed by Rawl's competitors.

Both the district court and the court of appeals held that Rawl's special deal with the UMWA was ineffective at eliminating the long-term obligations to which the company had voluntarily agreed by authorizing, ratifying, and executing the 1978 and 1981 NBCWAs. The courts held, not surprisingly, that Rawl must honor its contractual commitments and therefore must contribute to the Funds at the rates required by successor NBCWAs—*i.e.*, the NBCWAs of 1984 and 1988. Rawl cannot receive the benefit of the Funds without sharing the Funds' financial burden. Since 1984, Rawl has received a free ride in the Funds, at the expense of its competitors. Its retirees have received full retirement benefits, paid for by others. Rawl's outrageous position was correctly rejected by the courts below.

Although none of the questions presented for review challenges the interpretation of the relevant contractual language by the courts below, Rawl goes to great lengths in its Statement of the Case to suggest that there is some conflict between the language of Article XX(d) of each NBCWA, which establishes contribution rates and provides that those rates apply only for the term of that NBCWA, and the evergreen clause obligation to make contributions as required by *successor* NBCWAs. As the

court of appeals correctly noted, the time limit of Article XX(d) "comprehends only the termination of the particular NBCWA and the contribution rates specified there; it does not . . . provide for the general termination of the *duty to contribute* to the trusts." Pet. App. 7 (emphasis in original).

ARGUMENT

The court of appeals' decision is correct and further review is not warranted. The decision rests on the interpretation of a single provision in a single collective bargaining agreement dealing with problems that are in many ways special to a single industry. The narrow issue of contract interpretation decided by the courts below will have little, if any, impact beyond the evergreen clause litigation. No overarching unsettled principle of law is at stake, and there is no conflict among the circuits regarding the meaning of the evergreen clause or the methods used by the courts below to ascertain that meaning. Rather, the court of appeals' decision involves the application of well-established and non-controversial principles of contract law to largely undisputed facts. The bargaining history and other evidence on which the courts below relied was voluminous and uncontroverted. As the court of appeals observed, Rawl's submissions fell "far short of what is necessary to undermine or contradict the Trustees' evidence." Pet. App. 11. Moreover, the future significance of the evergreen clause has been substantially diminished by Congress' decision in the Coal Act to adopt a statutory regime for financing future health care for coal industry retirees.

In any event, the issues for which petitioner seeks review are not properly presented by this case. Two of the three arguments now advanced by petitioner were not even made by petitioner or any other party in the courts below, and, as a result, those issues were neither addressed nor decided. As to the third argument now pursued by petitioner, the court of appeals correctly concluded, in

reasoning that also applies to petitioner's other two points, that the issue is not properly in this case. All of petitioner's arguments deal, in one way or another, with the concept of waiver, but this case is not about any alleged waiver. Rather, it concerns a specific exercise of collective bargaining rights and the proper interpretation of the resulting labor agreement. Nothing in federal labor law or policy condemns long-term solutions to thorny problems when those solutions are reached in arm's-length negotiations between management and labor.

Rawl's belated effort to portray itself as the defender of the rights of its employees to select a bargaining representative rings particularly hollow. In the first place, Rawl has no standing to raise such concerns. Second, there is no evidence that a single member of Rawl's workforce is dissatisfied either with the UMWA's performance as collective bargaining representative or with the evergreen clause itself. Third, and most fundamentally, this derivative "waiver" argument, which makes its first appearance in this litigation in the petition, fails for the same reason Rawl's principal waiver arguments fail: Rawl's employees exercised, rather than waived, their right to bargain through the representative of their choosing. The evergreen clause is the result of that bargain, and it is binding.

Finally, Rawl complains that it signed the 1978 and 1981 NBCWAs without understanding them, that the express contractual commitments made in this case were contained in trust documents "not routinely provided" to BCOA members and that, as a "smaller member" of BCOA, it was "unwittingly" lured into signing an agreement designed by and for BCOA's larger members. Rawl's self-professed ignorance, which was first raised *after* the district court had entered summary judgment against it, is neither credible nor availing. Rawl and its parent, one of the nation's largest coal conglomerates, were privy to BCOA's negotiating goals, shared those goals, and had access to all of the documents at issue in

the case. Moreover, Rawl cites no authority for the remarkable proposition that it can avoid a contractual obligation it voluntarily assumed simply by claiming that no one tutored its officers on the agreement's consequences.

I. THIS CASE WAS PROPERLY RESOLVED UNDER WELL-ESTABLISHED PRINCIPLES OF CONTRACT LAW THAT DO NOT WARRANT FURTHER REVIEW

Rawl's petition does not seriously challenge the Trustees' reading of the evergreen clause, its genesis, or its purpose. Such a challenge would be futile in any event; as the court of appeals noted, the Trustees' reading of the evergreen clause is "the only reasonable interpretation" (Pet. App. 6, 11), and the language of the clause, taken in context, is "unambiguous[]" (*id.* at 7), "plain" (*id.* at 8), and "clear in its effect" (*id.* at 9). The court of appeals concluded that the "language of the relevant provisions in the applicable trust and collective bargaining agreements *unambiguously obliges* signatory employers [like Rawl] to contribute to the trusts at the rates specified in the current NBCWA, *irrespective of the employer's failure to sign that NBCWA.* The evergreen clause in the trust documents *clearly* does not include a durational limitation to the employer's duty to contribute to the trusts." *Id.* at 7 (emphasis added). The evergreen language, the court held, is "clear in its effect of permanently binding signatory employers [like Rawl] to the contribution rates established in current NBCWAs . . . ." *Id.* at 9. Moreover, the court of appeals found that the Trustees' reading of this "unambiguous" language was buttressed by "compelling" contemporaneous documentary evidence and unchallenged affidavit testimony from *both* sides of the negotiating table. *Id.* at 8-9.

This thoroughly unsurprising result poses no question worthy of review by this Court. The contract at issue is *sui generis,* the product of the unique characteristics of the coal industry and the historical evolution of the re-

spondent multiemployer plans and the NBCWA. In fact, Rawl concedes that the contractual provision at issue is "unprecedented." Pet. 11. The applicability of this *sui generis* contract has been limited even further by the Coal Act, which has deprived the evergreen clause of any prospective application with respect to health benefits.[7]

II. NO ISSUE OF WAIVER IS PRESENTED BY THE FACTS OF THIS CASE

The issues for which Rawl now seeks review are not presented by this case. The central feature of Rawl's petition—mentioned no fewer than 20 times—is its claim that the evergreen clause results in a "perpetual waiver" of various bargaining rights allegedly guaranteed under the National Labor Relations Act ("NLRA") to Rawl and its employees. But, as the court of appeals aptly noted, every collective bargaining agreement by its very nature "removes [any matter resolved therein] *pro tanto* from the range of bargaining." Pet. App. 17, *quoting Link Coal*, 970 F.2d at 905. The evergreen clause is not a "waiver" of the right to bargain, *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), but rather the product of its exercise.

Rawl concedes that it authorized BCOA to negotiate its labor agreement with the UMWA in 1978 and 1981 (Pet. 5); it concedes that BCOA reached agreement with the Union on terms that included the evergreen clause (Pet. 4-5); and it acknowledges that, by ceding to BCOA the right to negotiate the NBCWA on its behalf, it became bound by the resulting ratified contract, whether or not it knew about or participated in the course of negotiations or thought the agreed-upon terms were wise (*id.* at 20 & n.10).

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[7] In the Coal Act, Congress evinced its preference for a statutory solution to the problem of coal industry health benefits. Although the Fund Trustees will recoup through this litigation amounts previously due under the evergreen clause, Rawl's *future* obligations for health benefits for retirees in the multiemployer plans will be exclusively statutory, not contractual.

Given these facts, Rawl's claim of waiver is just what the court of appeals termed it—specious. Pet. App. 17. "[W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer and instead cedes full discretion to the employer on that matter. . . . [A] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain over a matter; but where the matter is covered by a collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant." *Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992) (emphasis in original), *quoting Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). As the Seventh Circuit has observed, "where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather the contract will control and the clear and unmistakable intent standard is irrelevant." *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (Posner, J.).

Rawl does not, and could not, dispute that labor and management can agree to extend certain contractual arrangements beyond the termination of the balance of their collective bargaining agreement. *Litton Financial Printing Div. v. NLRB*, 111 S. Ct. 2215 (1991). Similarly, there is no doubt as to the enforceability of a collectively bargained promise to provide "lifetime" health benefits. *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). Nor has Rawl suggested why "federal labor policy" would sanction a promise of lifetime benefits but condemn a long-term commitment to pay for those benefits.

Nonetheless, Rawl insists that the evergreen clause is inimical to "national labor policy" because of its assertedly "perpetual" duration. Rawl cites not a single court or NLRB decision purporting to articulate this national policy, and BCOA is aware of none. To the contrary, courts have consistently recognized that if the parties intend certain contractual obligations to extend beyond the term of their collective bargaining agreement, such promises are binding and enforceable. *See Litton, supra,* and cases cited therein.[8]

Rawl's facile attempt to manufacture a disagreement among the courts of appeals is similarly unavailing. Rawl argues that the D.C. Circuit and the Seventh Circuit, alone among the courts of appeals, have eschewed the "clear and unmistakable" standard for identifying bargaining waivers, and have thus departed from this Court's decision in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983).

Rawl's argument is a non sequitur. As explained above, the court of appeals correctly ruled that BCOA

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[8] In fact, Rawl's obligations under the evergreen clause are not "perpetual." By its terms, the evergreen clause obligates the signatory employer to make contributions only as required by successor NBCWAs. When the 1950 Pension Fund became fully funded in 1987, BCOA and the UMWA agreed to reduce to $0.00 the contribution rate for the Fund in the 1988 NBCWA. Accordingly, Rawl's allegedly "perpetual" obligation to the 1950 Pension Fund was nonexistent under the 1988 NBCWA. Similarly, when Congress passed the Coal Act, it terminated Rawl's future "evergreen" obligation to both the 1950 and 1974 Benefit Trusts. Thus, of the alleged "perpetual" contractual obligations to contribute to four UMWA Funds, no contributions are now required for three of those funds. With respect to the fourth fund, the 1974 Pension Plan, negotiations currently are ongoing between BCOA and the UMWA for a successor to the NBCWA of 1988, which expired on February 1, 1993. Contributions will be required to the 1974 Pension Plan under the evergreen clause only if a successor NBCWA is negotiated, and only if that Agreement requires contributions to the 1974 Pension Plan.

members (including Rawl) had, in fact, bargained with the UMWA over employee benefit contributions and that the evergreen clause was the enforceable product of those negotiations. Accordingly, the court found no occasion to apply a standard applicable to the waiver, rather than the exercise, of the right to bargain.

Even if we were willing to assume that there is disagreement among the circuits in the treatment of waiver issues (and we are not),[9] *and* that this case poses a waiver issue of sorts (which it does not), review would still be unwarranted. The court of appeals explicitly held that the Trustees' reading of the NBCWA was "the only reasonable interpretation" (Pet. App. 6, 11), that the language of the evergreen clause was "unambiguous[]" (*id.* at 7), "plain" (*id.* at 8), and "clear in its effect" (*id.* at 9), and that the evidence supporting the Trustees' interpretation was "compelling" (*id.* at 11). Thus, even if one were to classify the evergreen clause as a waiver and to apply the "clear and unmistakable" standard to the facts of this case, the result reached by the court of appeals would remain unchanged, *i.e.*, the intent to "waive" bargaining would be clear and unmistakable.

In a curious variant to its waiver argument, Rawl maintains that the evergreen clause impairs the rights of its employees to decertify the UMWA as their bargaining representative. Rawl's workers, the argument goes, are stuck with UMWA representation in the same way

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[9] Rawl's imaginary conflict in the circuits arises entirely from *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585, 588 (6th Cir. 1986), a case whose facts are assertedly "similar to those of this case." Pet. 26. In fact, however, *General Tire* dealt only with an employer's obligation to bargain over changes in terms and conditions of employment *after* the expiration of the collective bargaining agreement at issue. Here, of course, Rawl undertook by contract, through the evergreen clause, a continuing obligation to contribute to the Funds as long as such contributions are required by successor NBCWAs. No such continuing contractual commitment was involved in *General Tire*.

that Rawl is assertedly stuck with BCOA representation; BCOA and the UMWA will negotiate in the future over contribution rates for the 1974 Pension Fund without input from either Rawl or its workers.

Even apart from Rawl's lack of standing to assert the alleged interests of its employees, and even apart from the complete lack of evidence that Rawl's employees share Rawl's assessment of the employees' interests, this variant of Rawl's argument fails for the same reasons discussed above: the evergreen clause and the NBCWAs that incorporate it are the results of bargaining, not bargaining waivers. Just as Rawl authorized BCOA to negotiate the evergreen clause on its behalf and then voted to ratify it, Rawl's workers elected the UMWA as their bargaining representative to negotiate the agreement and then ratified the results. They are bound by their agreement to the same degree as Rawl.

III. RAWL'S ASSERTION THAT IT RATIFIED THE 1978 NBCWA "UNWITTINGLY" IS LEGALLY IRRELEVANT AND FACTUALLY INSUPPORTABLE

Rawl begins its petition with the claim that it is a small company (Pet. 4 n.1) and the suggestion that it was somehow victimized—duped—into executing the 1978 NBCWA and joining the 1981 NBCWA, without really understanding the agreements (*id.* at 4 n.1, 7, 11). In particular, Rawl argues that it was never told by BCOA that the evergreen clause obligated it to make contributions beyond the term of the collective bargaining agreement. *Id.* at 7, 21 n.11. Thus, Rawl insists, it authorized BCOA's negotiations and ratified the results of those negotiations "unwittingly" (*id.* at 15) and, in negotiating the evergreen clause on its behalf, BCOA exceeded the "power of attorney" it had been granted (*id.* at 22).

Rawl's argument is both legally irrelevant and factually baseless. First, Rawl's claim that it was somehow misled into signing a contract it didn't understand plainly

has no relevance in a collection action brought by the Trustees of the Funds. The Funds, as third-party beneficiaries of the labor agreements signed by Rawl, may enforce Rawl's contractual promises free of any common law contract defenses Rawl might have, unless those defenses go to the legality of the promises themselves. Rawl's claims that it was uninformed or misguided in agreeing to the evergreen clause do not concern the legality of the clause or the NBCWA, and they are thus irrelevant to this case. *See Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960); *see also Teamsters Indus. Employees Welfare Fund v. Rolls Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993) (fraudulent inducement no defense to trustees' contribution action); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2d Cir. 1990) (same), *cert. denied*, 498 U.S. 982 (1990); *Central States, Southeast and Southwest Areas Pension Fund v. Independent Fruit & Produce Co.*, 919 F.2d 1343 (8th Cir. 1990) (same), *cert. denied*, 112 S. Ct. 59 (1991); *Central States Southeast and Southwest Areas Pension Fund v. Gerber Truck Svc. Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*) (same); *Southwest Admin., Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

Second, Rawl is not the mom-and-pop operation its petition suggests. As a principal constituent part of the A.T. Massey Coal Co. conglomerate, Rawl is an important component of the fifteenth largest coal operation in the United States, an operation that produced 16.9 million tons of coal in 1989. *See Coal Commission Report, A Report to the Secretary of Labor and the American People*, The Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits at 9-10 (November, 1990). Rawl and its parent are major players in the nation's coal industry, and petitioner's disingenuous attempt to portray itself as a small, helpless victim of industry giants does not withstand even minimal scrutiny.

Moreover, in 1978, when the evergreen clause was being negotiated, E. Morgan Massey was serving as Chairman and Chief Executive Officer of A.T. Massey Coal Co., President of Rawl, and a member of BCOA's Board of Directors. In 1981, when petitioner was reaffirming its contractual contribution obligations, Mr. Massey was serving not only on BCOA's Board of Directors, but also as a member of its CEO Committee and, as such, he "oversaw and directed the 1981 negotiations" between BCOA and the UMWA. Affidavit of E. Morgan Massey at ¶¶ 1, 2, J.A. at 838. Thus, throughout the relevant period, petitioner clearly was not excluded from the affairs of BCOA, including the negotiations about which it now says it knew nothing.

Rawl states in its petition that the trust documents containing the evergreen clause were not "routinely" provided to employees. Pet. 7 n.5. Significantly, however, Rawl never claims that *it* did not have copies of the relevant documents. Similarly, Rawl broadly suggests that the "final" language of the evergreen clause was unavailable to it at the time of ratification in 1978. The undisputed evidence below, however, established that the substance of the evergreen clause and draft language very close to the final version were agreed to—and available for review—in January or February, well before ratification of the 1978 agreement. J.A. 565-66, 598. Moreover, three years *after* approval of the "final" evergreen language in 1978, when Mr. Massey purportedly was "overseeing" BCOA's negotiations with the UMWA, Rawl ratified and executed the 1981 NBCWA incorporating the same language.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1992

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Petitioner,

v.

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QUESTIONS PRESENTED

Amici adopt the Questions Presented set forth in the Petition for Writ of Certiorari.

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IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

This brief *amicus curiae* is filed in support of the petition for writ of certiorari.[1] Each of the *amici* are companies which were formerly signatory to collective bargaining agreements

[1] Pursuant to Supreme Court Rule 37.2, this brief is filed with the written consents of the parties which are filed concurrently herewith.

with the United Mine Workers of America ("UMWA") which called for them to contribute to the United Mine Workers of America 1974 Pension Trust, United Mine Workers of America 1950 Pension Trust, United Mine Workers of America 1974 Benefit Plan and Trust or the United Mine Workers of America 1950 Benefit Plan and Trust ("Trusts"). They either are no longer signatory to a collective bargaining agreement with the UMWA or signed agreements that called for contributions under terms different from the National Bituminous Coal Wage Agreement ("NBCWA") negotiated between the UMWA and the Bituminous Coal Operators Association ("BCOA"). Some *amici* are former members of the BCOA. Others signed so-called "me too" agreements, which are short-form documents adopting the NBCWA *in toto*. Still others have negotiated separate agreements which called for contributions to the trusts on a basis differing from that of the NBCWA. Each of the *amici* are defendants in cases which raise issues similar to those raised in the petition.[2]

The issues presented in the petition directly impact upon the *amici* as well as potentially hundreds of other coal companies, since the court of appeals' decision has made the BCOA the permanent bargaining representative for pension and benefit purposes of every coal company which has at any time since

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[2] *UMWA 1974 Pension Trust et al. v. A&E Coal Company, et al.*, CA No. 88-1126 (D.D.C.) (Agipcoal); *UMWA 1974 Pension Trust et al. v. Canterbury Coal Company*, CA No. 92-1856 (D.D.C.), *UMWA 1974 Pension Trust et al. v. Aloe Coal Company, et al.*, CA No. 91-0207 (D.D.C.) (Aloe, Beilchick, Bentley, Tanoma and Valley); and *UMWA 1974 Pension Trust et al. v. Big Star Coal Co., et al.*, CA No. 9300031-A (W.D.Va.) (Double R. Trucking, Big Track Coal, Old Ralph Mining, Sourdough Enterprises, Doss Fork, McKinney Trucking, Patty Chandler Trucking, San-West, Spring Ridge, Coleman & Yates, and Mullins & Stanley).

1978 participated in the Trusts. Indeed, the Trusts have indicated that there are numerous other potential defendants who may be the subject of future lawsuits if the decision of the court of appeals is allowed to stand.

STATEMENT OF THE CASE

The respondents contend, and the court of appeals found, that the trust documents which have been incorporated by reference in each NBCWA since 1978 contain a clause which requires any employer that ever contributed to the Trusts to continue to be bound by the terms of the trust agreements negotiated (and later amended) by the BCOA and UMWA, even after the expiration of the NBCWA to which that employer was signatory.[3] Thus, for example, if an employer was a signatory to the 1978 agreement, (which terminated on March 27, 1981) even today that employer must abide by the terms of the Trusts, as amended to date, including making contributions to the Funds at the rates negotiated by the BCOA and UMWA in subsequent NBCWA's. According to this theory, this is so even if that employer has no current collective bargaining agreement calling for such contributions, has negotiated a different arrangement with the UMWA, or its employees are no longer even represented by the UMWA.

There are four Trusts at issue in this case. The 1950 and 1974 Pension Trusts, as their names imply, provide pension benefits to UMWA retirees. The 1950 and 1974 Benefit Plans and Trusts were created to provide health and other non-pension benefits to these same retirees and their dependents. Both 1950

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[3] This clause came to be referred to by respondents' counsel as the "evergreen" clause sometime after respondents filed the first of these lawsuits. The respondents only arrived at their current interpretation in March 1988, ten years after the clause was negotiated. *Amici* have disputed the meaning of this clause, but will refer to it as the "evergreen" clause for the sake of convenience. In doing so, *amici* do not concede that the interpretation placed on the clause by the Trustees or the court of appeals is correct.

plans are limited to employees who retired prior to January 1, 1976 and their dependents. The 1974 plans were designed to cover employees who retired after December 31, 1975 and their dependents. Many of the *amici* have no former employees who retired prior to 1976. Thus, they have no employees who have participated or ever will participate in the 1950 plans. Nevertheless, under the respondents' theory, they would be required to contribute to these funds as long as the UMWA and BCOA agree that such contributions are required.

The "evergreen" clause is not merely limited to an obligation to make future contributions to the Trusts. Rather, it purports to require employers to comply with all "terms and conditions" of the Trusts, as modified from time to time by the BCOA and the UMWA. The BCOA and the UMWA can and do routinely alter not only such terms as the rate of contributions and the method of computing such contributions, but also the level of benefits provided, vesting requirements, and even basic requirements for benefit eligibility. Given the scope of the settlors' authority and the range of terms they can determine, the clause constitutes a permanent designation of the BCOA as the collective bargaining representative for purposes of negotiating pension and health benefits for all employers who have at any time since 1978 participated in the Trusts.

Unlike the NBCWA's negotiated periodically since 1950, each of which expired after a designated date, the Trusts are perpetual. Since the terms of the Trusts are perpetual, they can only be changed by agreement of both settlors, the UMWA and the BCOA. Thus, unlike the terms and conditions of the NBCWA itself, which can be modified by either party at its expiration by that party simply refusing to enter into a new agreement containing an objectionable provision, each settlor has a virtual veto as to changes in the trust documents. Thus, if the court of appeals' decision is correct, the BCOA is placed in a position where it can keep its competitors in the Funds so long

as the BCOA deems it to be in its own best interest.[4] Even if the UMWA wished to negotiate different terms with other employers, it could not do so without the BCOA's consent. Thus, while the former signatories would be required to contribute indefinitely to the Trusts regardless of their individual needs, there is no reciprocal requirement on the part of the BCOA. The BCOA is free to stop all payments into the Funds at the expiration of an NBCWA simply by exercising its discretion not to agree to new contributions.

This case presents questions of law which will have a wide-ranging effect on the entire coal industry.[5] The *amici* will be directly affected by the court of appeals' decision as will every coal company which was at any time signatory to a contract calling for contributions to the Funds. That this case is of extreme importance to the coal industry and to federal labor policy was recognized by the district court when it stated:

> The interpretation of the evergreen clause has such far-reaching consequences for the coal industry, the Union, and federal labor law, that an expedited and final resolution of its meaning is imperative.

Petition App. 70

The impact of the court of appeals' decision on federal labor law and national labor policy will be unprecedented. Not

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[4] The BCOA is effectively controlled by its largest members, who have traditionally compromised or controlled its negotiating committee. Therefore, it might be more accurate to say that the BCOA negotiates whatever is in the best interest of these companies.

[5] Approximately 30% of all bituminous coal produced in the United States is produced by members of the BCOA or companies who have contracts identical to the NBCWA. This figure does not include the former signatories who are the so-called "evergreen" defendants. In addition, many of the larger BCOA companies have extensive non-union operations. Thus, the clause affects hundreds of companies which constitute an extensive portion of the coal industry.

only are the respondents, as in the instant case, seeking to subject former BCOA members perpetually to the terms of the Trusts, they are seeking to impose the Trust requirements negotiated by the BCOA and UMWA on former signatories who have *no* contract with the UMWA. Under the respondents' theory, even those employers whose employees have decertified the UMWA as their bargaining representative are still subject to the terms of the Trusts and all their subsequent modifications. If the court of appeals' decision is permitted to stand, it will encourage other multi-employer collective bargaining associations to perpetuate their status by negotiating similar provisions binding companies to the results of future negotiations even after those companies no longer wish to be members of those associations. The petition should be granted in order that this Court may consider the full implications of the court of appeals' decision, which, if allowed to stand, would undermine the well-established federal structure of multi-employer collective bargaining.

SUMMARY OF ARGUMENT

Petitioners have more than adequately set forth the reasons why a perpetual waiver of a statutory right to bargain collectively violates federal labor policy. *Amici* will not repeat those arguments here. Instead, *amici* will demonstrate why such waivers should be prohibited given their impact upon employers who are no longer signatories or whose employees are no longer represented by the UMWA. In its attempts to waive the future bargaining rights of its members and other signatory companies, BCOA's purpose was to reserve those rights to itself, through the so-called "evergreen" clause. This attempt violates federal labor policy for several reasons.

First, it constitutes an unlawful permanent assignment of the former signatories' bargaining rights to the BCOA in violation of section 8(b)(1)(B) of the National Labor Relations Act. 29 U.S.C. § 158(b)(1)(B). It permits the BCOA to negotiate terms and conditions of employment solely in its own members'

best interest, while perpetually binding non-members to the results of those negotiations. If the court of appeals' decision is allowed to stand, it will discourage employers from joining multi-employer bargain associations.

Second, the "evergreen" clause would unlawfully interfere with the former signatories' employees' right to choose their own collective bargaining representative as guaranteed in section 7 of the NLRA. 29 U.S.C. § 157.

Third, the clause would compel non-signatory employers to make payments to the funds which violate section 302(a) of the Labor Management Relations Act. 29 U.S.C. § 186(a). Former signatories would be required to make payments indefinitely into funds from which their employees receive no benefit. This violates the requirement that such contributions be made for the sole and exclusive benefit of the employer's employees.

ARGUMENT

I. A PERPETUAL WAIVER OF AN EMPLOYER'S RIGHT TO ENGAGE IN COLLECTIVE BARGAINING ON ITS OWN BEHALF VIOLATES FEDERAL LABOR POLICY.

Petitioners correctly state that this is a waiver case. If the court of appeals' interpretation is correct, in negotiating the "evergreen" clause BCOA sought to perpetually waive the rights of signatories to bargain individually regarding pension and retiree benefits. The court of appeals refused to assign the label "waiver" to the case, but regardless of how it is denominated, the BCOA's permanent assignment to itself of the individual employers' bargaining rights is unlawful.

A. The Permanent Designation Of BCOA As A Former Signatory's Collective Bargaining Representative, As Required By The "Evergreen" Clause, Impermissibly Assigns Permanent Authority To The BCOA To Negotiate New Terms And Conditions Of Employment On Behalf Of The Former Signatory.

The nature of multi-employer bargaining is that it is purely voluntary. *Bonanno Linen Services Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(b)(1)(B), provides that an individual employer may not be forced to join a multi-employer bargaining unit such as the BCOA. *NLRB v. Amax Coal*, 453 U.S. 322, 334-35 (1981).[6] It is well settled that an agreement

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[6] While this Court in *Amax* distinguished efforts by a union to compel an employer to contribute to a multi-employer trust fund from efforts to compel an employer to engage in multi-employer collective bargaining, that case did not address the question presented here. *Amax* was concerned with whether the funds' trustees were collective bargaining representatives within the meaning of Section 8(b)(1)(B). The Court held that they were not.

It is significant to note that the trust funds at issue in *Amax* did not contain the "evergreen" clause. That clause was not included in the trust documents until approximately three years after the events which lead to the unfair labor practice charges in *Amax*. Amax had participated in the funds in the past and the labor dispute centered on its decision not to participate any longer. Amax was in fact bargaining for itself concerning whether it would continue participating in the funds and the terms of its participation. Its complaint was that it would not have a representative on the funds' board of trustees, not, as is here, that the BCOA was in fact negotiating on its behalf concerning the terms of its participation.

This case presents the question of whether it is lawful to permit the BCOA and the UMWA to agree between themselves to permanently designate the BCOA as the collective bargaining representative of all companies who contributed to the funds. There is no question that BCOA is a collective bargaining representative within the meaning of Section 8(b)(1)(B). The only reason for its existence is to represent its members in collective bargaining.

to be bound by the results of future negotiations between an employer association and a union is tantamount to a designation of that employer association as a collective bargaining representative. In cases where a union has attempted to compel an employer to enter into such an agreement, the National Labor Relations Board has found that such pressure constitutes an unlawful interference with the employer's right to select its collective bargaining representative. *See, e.g., Laborers' Local Union No. 652 (Thoner Development Co.)*, 238 NLRB 1456, 1462 (1978); *Retail Clerks Union, Local 770 (Fine's Food Co.)*, 228 NLRB 1166, 1167-1168 (1977).

It is equally well settled that while an employer and union can bargain over wages, hours and working conditions of that employer's own employees, they cannot bargain over working conditions of employees outside the bargaining unit.[7] That is exactly what the court of appeals' decision would allow the BCOA and UMWA to do. Not only would BCOA have unilateral authority to bargain over benefits covering employees of other employers represented by the UMWA, it would have the same authority to bargain with employers whose employees are not represented by the UMWA. Thus, under the respondents' interpretation, as adopted by the court of appeals, the UMWA would continue to represent employees for benefit purposes even if it were decertified. Absent support by a majority of the employees in an appropriate bargaining unit, however, a union is prohibited from bargaining on those employees' behalf.[8]

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[7] "[T]here is nothing in [national] labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666 (1965).

[8] "There could be no clearer abridgement of § 7 of the Act, assuring employees the 'right to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity." *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961).

As stated above the "evergreen" clause does not merely purport to bind former signatories to make ongoing contributions to the Funds at a fixed rate or to fund defined obligations agreed upon during a time when they were members of the BCOA. Instead, the "evergreen" clause, as interpreted by the court of appeals, confers a right upon BCOA to bind former signatories to new or modified terms or conditions of employment, without those companies having any right to participate in the negotiation of, or consent to the acceptance of, such terms. Thus, the "evergreen" clause serves only to perpetuate the BCOA in its status as a collective bargaining representative.

As interpreted by the court of appeals, the "evergreen" clause obligates a former signatory on a perpetual basis[9] to participate fully in the Trusts under whatever terms and conditions the UMWA and BCOA establish without regard to whether that company is a member of BCOA or even whether its employees continue to be represented by the UMWA. Indeed, under such an interpretation, BCOA may use that authority in a manner directly adverse to the interests of the former signatory.

Since the so-called "evergreen" companies have no voice in the negotiations, the UMWA and BCOA would have the ability to increase benefits and to alter the contribution formulae in a manner that advances the competitive interests of certain BCOA members. They would have the ability to discriminate in the delivery of benefits from the Trust's resources against companies that have withdrawn from BCOA. They could permit new beneficiaries to join the Funds, to be paid for by former

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[9] Respondents have disputed the characterization of the obligation as "perpetual", arguing that it is not perpetual since it lasts only so long as the UMWA and BCOA agree to subsequent NBCWA's. Such an argument misses the point. It is precisely because the BCOA is the only employer party who decides how long the obligation will exist, and in what form it will take, that the clause constitutes an unlawful reservation of bargaining rights to the BCOA. What is undoubtedly perpetual under the "evergreen" clause is the BCOA's authority to bargain on behalf of the former signatories.

signatories. Such actions by BCOA are not theoretical or speculative. Since 1978, BCOA has undertaken each and every of the described activities.

1. The BCOA and UMWA Can Increase and Have Increased Benefits Without The Consent of Former Signatories.

Since 1978, there have been numerous important substantive changes in benefits provided by the various Trusts. Pension benefits have been increased substantially. For example, in the 1988 NBCWA, the BCOA agreed to a pension change that could boost benefits by more than 40% from the prior agreement. The surviving spouse benefit also has been increased from 50% (J.A. 714) to 75% (J.A. 725). The death benefit has been increased and the responsibility for payment thereof has been transferred from certain signatory companies to the Funds (J.A. 194). In 1988, the level of reimbursement to providers was substantially increased, thereby greatly increasing the cost to the Trusts of providing benefits, without any offsetting benefit to participants and beneficiaries.[10] The so-called "evergreen" companies had no input in these decisions.

2. The BCOA and UMWA Can Modify and Have Modified the Contribution Formula To Benefit BCOA's Larger Members, To The Corresponding Disadvantage of Small Members and Former Signatories.

Prior to 1988, the formula for contributions to the 1950 Benefit Trust was based solely upon tons of coal produced by a signatory. Under the 1984 NBCWA the contribution formula for the 1950 Benefit Fund was 61 cents/ton (J.A. 710).

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[10] The increase served to help equalize the amounts paid to providers by the Trusts and amounts paid by BCOA companies to providers who served BCOA companies' active employees.

The 1988 NBCWA dramatically altered this formula. For the first time contributions to all the Funds were based solely upon classified hours worked.[11] The initial contribution rate to the 1950 Benefit Fund was $1.83 per/hour (J.A. 722). This change in the funding formula altered the competitive balance among employers.

Coal is generally sold in the market on a dollar per ton or cents per million btu basis. Therefore, with due regard for quality differentials, competition is based upon a head-to-head price-per-ton comparison. The changed formula favors the large producers which control BCOA. They are able to mine large amounts of coal while using fewer workers through the use of long walls and large draglines. For example, at a contribution rate of $1.83 per hour, a company able to produce six (6) tons per manhour pays a contribution of approximately thirty cents ($.30) per ton whereas a company producing two (2) tons per manhour pays a contribution of approximately ninety-one cents ($.91) per ton.

When the combined rates of all the Trusts is taken into account, the differential between a mine producing six tons per hour versus a mine producing two tons per hour reach additionally adverse levels. In a market where prices for spot coal have declined to approximately $20 per ton, this is a significant competitive factor.

The impact of this change is particularly stark with respect to a company which only cleans or transports coal. Because contributions to the 1950 Benefit Trust under the 1984 NBCWA were based solely upon tons mined, such a company did not have any tonnage to report, and thus was not required to make any contributions whatsoever to the 1950 Benefit Trust. In the 1988 NBCWA however, the contribution formula was changed to a

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[11] The only exception was a royalty applied to coal purchased or acquired by the signatory company from non-signatory sources.

dollar/hour formula. Therefore, under the court of appeals' interpretation, even if such a company withdrew from BCOA upon the expiration of the 1984 NBCWA, and even though it had not been required to make contributions to the 1950 Benefit Fund while it was a member of BCOA, it now finds itself faced with a contribution obligation under a formula negotiated *after* it lawfully withdrew from BCOA.

3. The BCOA and UMWA Have Negotiated Terms Which Discriminate in Favor of Signatory Companies, and Would Have the Power to Do So in the Future.

As executed, the 1988 NBCWA required signatory employers to pay a life insurance benefit of $3,500 upon the death of a 1974 Plan pensioner of the signatory employer (J.A. 726). In 1991, however, the BCOA executed a Reopener Agreement with the UMWA under which the death benefit payment obligation was increased to $5,000 and the obligation to make the payment was shifted from the companies to the 1974 Pension Trust (J.A. 194). Of course, the former signatories were not entitled to participate in the negotiations over the Reopener Agreement.

The benefit of the Reopener Agreement did not flow to every signatory employer. Instead, the Reopener Agreement provided that non-BCOA signatory employers could obtain the transfer of this payment obligation only if they were already signatory to a standard NBCWA and the 1991 Wage and Pension Reopener Agreement with the UMWA. So-called "evergreen" companies that had reached separate agreements with the UMWA, were still bargaining with the UMWA, or which no longer had any bargaining relationship with the UMWA could not conceivably receive any benefit from this transfer.[12] Yet, under the court of appeals' decision that the

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[12] Respondents argue that "*any*" contributing employer could take advantage of this provision simply by signing the Reopener Agreement. Op-

"evergreen" clause requires such companies to be bound to contribution rates to the 1974 Pension Fund identical to BCOA companies, the non-signatory companies must help pay for the UMWA-BCOA agreement transferring the BCOA companies' death benefit obligation to the 1974 Pension Fund.

The foregoing examples illustrate the permanent competitive advantage which the court of appeals' decision would confer on the BCOA. There is no legitimate labor policy objective served by allowing the BCOA to assign to itself the power to make such changes on a permanent basis. Neither the Trustees, the UMWA, nor the BCOA have a legitimate interest in controlling who will represent the "evergreen" employers for the purposes of addressing such ongoing collective bargaining issues. To the extent that the "evergreen" clause purports to permit the UMWA and BCOA to change such terms and conditions for the former signatories, it serves only to perpetuate the BCOA in its status as the collective bargaining representative for the "evergreen companies".

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position at 9 n.12. However, the respondents' argument itself demonstrates that the "evergreen" clause would force employers to use the BCOA as their bargaining representative. In negotiating the Reopener, BCOA has said, in effect: "We have agreed with the UMWA that you must financially support this new arrangement, whether you receive any benefit or not. If, however, you want to receive any benefit for the money we have agreed that you will pay, you must sign the Reopener with the UMWA." Further, the respondents' argument is certainly not true for employers whose employees have decertified the UMWA. Signing such a collective bargaining agreement in those circumstances would violate Section 8(a)(2) of the NLRA. 29 U.S. 158(a)(2). Under the petitioners' theory, these employers must still pay money to the funds, part of which will go to pay the death benefit obligations of BCOA members.

B. The Court Of Appeals' Decision Will Undermine Multi-employer Collective Bargaining, Since Few Employers Will Join A Collective Bargaining Association If That Association Can Obtain Perpetual Negotiating Rights.

It is well settled that once bargaining has commenced employers are not free to withdraw from multi-employer bargaining absent mutual consent or other "unusual circumstances". *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982). Such "unusual circumstances" will be found only where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented. *Id.* at 411. An employer may not reject a multi-employer contract merely because it does not agree with its terms.[13] On the other hand, the employer is free to withdraw from the multi-employer bargaining unit upon proper notice prior to bargaining and bargain for a new, individual contract after the expiration of the multi-employer agreement. *Id.* at 412. In adopting the rule that an employer could not withdraw after bargaining had begun, neither the NLRB nor this Court could have intended that the employer could be bound by a provision negotiated by its agent which arrogated to that agent the authority to bargain for the employer in perpetuity.

In view of these considerations, it would be a manifest injustice to bind an employer to an association agreement which creates a perpetual obligation to comply with the results of future negotiations. Such an agreement extends well beyond the scope of legitimate multi-employer bargaining and serves no legitimate policy of labor law. To find that an employer, having

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[13] *See, e.g. Falkowski Grocery*, 236 NLRB 473, 475 (1978) ("It is well established Board law that an employer who enters a multi-employer bargaining group is not free to examine the product of such negotiations to decide whether to accept those terms but must abide by the terms of that agreement negotiated on a group basis.").

once joined multi-employer bargaining, could be compelled to remain bound in perpetuity to future negotiations, threatens the basic concept of multi-employer bargaining. No employer would ever join multi-employer bargaining if it knew that it was risking a permanent loss of its bargaining authority.

C. Under The Respondents' "Evergreen" Theory, The Former Signatories' Employees Have Perpetually Waived Their Right To Choose Their Exclusive Bargaining Representative.

Section 7 of the NLRA guarantees employees the right to engage in collective bargaining through an exclusive representative, as well as the concurrent right to refrain from engaging in collective bargaining. 29 U.S.C. § 157. A trust fund's retention of contributions for employees no longer represented by the relevant union "strikes at the very core of collective representation" by forcing the employees into a "devil's alternative" of either forfeiting their right to contributions or retaining a collective bargaining representative with whom they are less than satisfied. *Local 50, Bakery and Confectionery Workers' Union v. Local 3, Bakery and Confectionery Workers' Union*, 733 F.2d 229, 233 (2d Cir. 1984). If the "evergreen" clause imposes continuing obligations on non-signatories, the UMWA retains the exclusive right to negotiate regarding pension and retiree health benefits regardless of whether the affected employees continue to be represented by the UMWA for purposes of collective bargaining. By retaining this right, the UMWA has waived the employees' right to select another representative.

This waiver can result in a detriment to those employees who are no longer represented by the UMWA for purposes of collective bargaining. A perfect example of this is the Reopener Agreement discussed above. An employer whose employees are no longer represented by the UMWA cannot obtain the

increased death benefits which were provided by 1974 Pension Trust under the Reopener Agreement.

Thus, the "evergreen" clause, as interpreted by the court of appeals and applied by the respondents, induces employees to retain the UMWA as their representative, and waives their right to withdraw the UMWA's authority to act as their representative with respect to pension and health benefits. Such agreements, however, are prohibited by the National Labor Relations Act. In *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974), this Court held that a union may not waive employee's rights relating to their choice of a bargaining representative. As this Court explained in *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 705-706 (1983), a "union may bargain away its members economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative."

Accordingly, under the respondents' theory, not only does the "evergreen" clause waive the employer's right to withdraw from multi-employer bargaining, it waives their employees' right to have a free choice in their selection of an exclusive collective bargaining representative as well.

II. THE COURT OF APPEALS' DECISION WOULD COMPEL EMPLOYERS WHO ARE NO LONGER SIGNATORIES TO MAKE PAYMENTS TO THE TRUSTS WHICH ARE ILLEGAL UNDER SECTION 302(A) OF THE LABOR MANAGEMENT RELATIONS ACT.

Section 302(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(a), generally prohibits an employer from paying money or any other thing of value to any "representative" of the employer's employees. Trustees of union affiliated trust funds are "representatives" within the meaning of section 302(a) and, thus, are subject to the prohibition of

section 302(a). *See, e.g., Moglia v. Goeghegan*, 403 F.2d 110, 116 (2nd Cir. 1968), *cert. denied*, 394 U.S. 919 (1969).

The legislative history of the Taft-Hartley Act is replete with Congressional concerns about former UMWA President John L. Lewis using employer fringe benefit contributions to create a war chest for the United Mine Workers. *See*, e.g. S. Rep. No. 105, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 4875-76 (daily ed. May 8, 1947). To address these concerns, the Congress enacted, inter alia, LMRA section 302(c)(5). 29 U.S.C. § 186(c)(5). From that time on, for a period of over forty years, the UMWA Funds have been required to comply with section 302(c)(5). *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). The court of appeals' decision undermines that forty-year history of the Trusts' compliance.

Employers with no current contract with the UMWA are precluded by section 302(c)(5) from making the payments which petitioners seek under the continuing contributions theory, because such payments would violate the requirement that contributions must be for the "sole and exclusive benefit" of the employees. The "sole and exclusive benefit" provision ensures that, like wages, payments to a trust fund which are in exchange for employees' labor are protected, so that employees may enjoy the "sole and exclusive benefit" of their efforts. *Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528, 533 (2d Cir. 1991) *cert. granted*, 112 S. Ct. 2990 (June 22, 1992)(No. 91-610).[14] Employees who will never receive any benefit from a trust fund, for example because they have chosen

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[14] This case raises an issue which is one step beyond *Demisay*. There, the Court has been asked to determine whether or not contributions already paid in to a fund must be transferred to a new fund to cover employees of employers who have withdrawn from the original multi-employer plan. This case involves the question of whether the employer can be compelled to pay *future* contributions after it has withdrawn from a plan from which its employees will not receive any benefit.

a different collective bargaining representative, do not receive the "sole and exclusive benefit" envisioned in Section 302(c)(5). *Id.* at 534. Thus, coal industry employees whose current employers have no contract with the UMWA would gain no benefit from the payments which the respondents seek.[15] Payment of those contributions would violate section 302(c)(5).

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[15] Although respondents have been providing benefits to retirees of some "evergreen" employers since approximately 1990, this contrasts with their practice between 1978 and 1990, which was to deny benefits to employees for time worked for an employer that was not then a signatory to an agreement with the UMWA. *Amici* submit that this earlier, pre-litigation practice is the only practice which reasonably comports with the language of the trust documents.

CONCLUSION

The petition raises issues of critical importance for the coal industry in particular and the future of multi-employer collective bargaining in general. If the court of appeals' decision is allowed to stand, few if any, employers will agree to join multi-employer collective bargaining associations since they cannot do so without the fear that the association and union will permanently waive the individual employer's and his employees' rights to negotiate on their own behalf. This constitutes an important question of federal labor policy which must be addressed by this Court.

For these reasons, we urge the Court to grant the Petition for Writ of Certiorari.

Dated: June 7, 1993

Respectfully submitted,

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No. 92-1775

IN THE

Supreme Court of the United States

October Term, 1992

RAWL SALES AND PROCESSING COMPANY,

Petitioner,

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER RAWL SALES AND PROCESSING COMPANY

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June 14, 1993

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[1/] Pursuant to Rule 29.1 of the Rules of the United States Supreme Court, Rawl states that the disclosure contained at page ii of its Petition for Certiorari does not require amendment.

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REPLY OF PETITIONER RAWL SALES AND PROCESSING COMPANY

1. The Issues Were Raised Below

In a startling mischaracterization of the proceedings below, the Trustees claim that the waiver issues set forth in Rawl's Petition were not raised to the court of appeals. In its Statement of Issues to the appellate court, Rawl posed the following question:

> 4. Whether the district court erred in its conclusion that enforcement of the labor contracts, as interpreted by Plaintiffs, does not *violate federal labor law and policy?*

Joint Br. of Appellants at 2.[1/]

Rawl went on to "seek judgment on [its] strictly legal defense of . . . violation of federal labor policy," *id.* at 5, explaining that "[t]hese [federal policies] protect the rights of employers to withdraw from multi-employer collective bargaining units and the right of employers to independently negotiate and sign labor agreements governing the terms of employment, including health and pension benefits." *Id.* at 27-28.

At every stage of this litigation Rawl argued that its statutory right to bargain has been waived, and that the right had been taken, in perpetuity, by BCOA. *See* Rawl's Reply Mem. in Support of Summ. J., JA 185-188, Joint Br. of Appellants at 2, 47-50. Throughout the litigation Rawl argued that as a result of the waiver of bargaining rights, it has been prevented from effectively withdrawing from the multi-employer group. This is the underpinning of all of its arguments to this Court. There can be no real dispute that Rawl adequately raised the issue of perpetual waiver of bargaining rights below.

It is likewise perplexing for Respondents to intimate surprise at Rawl's contention that the waiver issue conflicts with federal labor policy since Rawl raised it below as one of the four principle issues in the case. Moreover, in the

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[1/] Indeed, Rawl and Pittston urged the Court of Appeals to grant leave to appeal on the grounds that the case presented questions of "federal labor law and policy" involving an "employer's right to withdraw from multi-employer bargaining," . . ."waiv[er] [of] the statutorily protected right . . . to bargain" and because the district court's decision had "ramifications for all current and future collective bargaining agreements and the parties who negotiate them. . . ." Pittston's Pet. for Leave to Appeal at 17-18.

court of appeals the Trustees, citing *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), fully briefed the issue that the companies were being coerced in the selection of their bargaining representative. Br. of Appellees at 58-60. Thus, to suggest that these issues were not presented to the court of appeals misstates the facts.

All of the arguments Rawl urges this Court to hear are closely related to the central issue of waiver. The important fact is that each of these arguments was before the court of appeals and that the court and the Trustees had ample opportunity to address each of them. The issues presented are not foreign to this litigation, nor do they present new causes of action or novel arguments.[2/]

In its rush to decide this case, the court of appeals ignored the important effect that its decision would have on the collective bargaining relationship of Rawl and hundreds of other coal companies, as well as the effect on all companies engaged in multi-employer bargaining. The fact that the court refused to address these issues does not undermine Rawl's Petition. Because the court of appeals was of the opinion that a waiver argument is "specious", App. 17, it is not surprising that the court did not address the effect of such a waiver. In the view of the court of appeals, it would be superfluous to consider the effect of something that was not present in the case. Rawl's Petition

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[2/] Each of the cases cited by the Trustees involved an entirely new issue that had been raised in this Court. For example, in *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1980), the entire issue presented to the Court of Appeals involved Fed. R. Civ. P. 68. On certiorari, the Petitioner attempted to raise the issue of whether the district court abused its discretion by denying costs under Rule 54(d). Predictably, this Court refused to exercise its jurisdiction to reach that question.

asks this Court to recognize that an important waiver of rights is present and, unlike the court of appeals, focus on the issues presented by that waiver.

2. This Is a Waiver Case

Respondents never confronted the crux of why this is a waiver case. They acknowledge that, in other waiver cases, the parameters of the post contractual commitment are either fixed or tied to an objective standard. Opp'n. p. 9.[3/] In this case, whether benefits will be provided at all, the level of those benefits and what they will cost are entirely dependent on periodic collective bargaining in which Rawl may not participate. In the years to come, pension benefits may be increased or decreased and other benefits such as life insurance may be added or subtracted from the benefits provided by the Funds. The negotiated cost of these benefits may skyrocket or BCOA and the union may place the payment burden disproportionately on non BCOA members. Rawl has no say in any of it and yet Rawl and its employees are bound by all of it. Thus, benefits and their costs are not, as the Trustees say, "specified." Opp'n. p. 9-10, n. 13.[4/]

It cannot be said here that Rawl "has exercised" its right to bargain as a result of a contractual commitment which extends beyond the contract's term. Bargaining

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[3/] Respondent's Brief in Opposition is cited as "Opp. p. ___."

[4/] Attempting to make less of the case, Respondents omit any reference to the fact that BCOA will negotiate for Rawl the level and nature of benefits to be provided Rawl's employees, not just the cost of those benefits to Rawl. Moreover, the Coal Industry Retiree Health Act of 1992, discussed at length by Respondents, does not pertain to pension or life insurance benefits.

continues -- bargaining which affects essential terms and conditions of employment. Contrary to Respondent's argument, it is self-evident that the contract at issue here has not "fully defined the parties' rights as to what would normally be a mandatory subject of bargaining." *See Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). Nor did the agreement "fix[] the parties' rights and foreclose[] further mandatory bargaining." *See Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991). Rather, those rights will be defined through future, mandatory collective bargaining.[5/]

One of the Trustees' arguments especially proves Rawl's point. In 1991 the BCOA and the union decided that the Funds would provide death benefits to retirees of BCOA members signatory to the 1988 Wage Agreement --benefits which individual employers previously were contractually obligated to provide. Pet. p. 14; Opp'n. p. 9, n. 12. This change constituted a financial advantage to BCOA members. The Trustees argue that BCOA has gained no advantage over its competitors because any contributing employer -- not just any BCOA member -- *which accepted the reopener settlement negotiated by BCOA and the UMWA* could shift liability for death benefits to the Funds. *Id.* In other words in order to receive the benefit, the non BCOA employer

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[5/] The cases cited by the Trustees at note 13 of their brief are inapposite. In each of those cases the employer merely promised to provide benefits beyond the term of the collective bargaining agreement. The employer and the union would decide together what these benefits would be and how to allocate the costs. There was no issue in any of those cases as to whether the employers had given away the right to bargain with the union over what the benefits would be or how they would be funded and paid out. Here, it is the central issue -- Rawl has no such right.

must accept BCOA's settlement, one which it did not negotiate.

If Rawl has permanently delegated its bargaining right to BCOA, Respondent's argument further demonstrates why the collective bargaining process fashioned by the court of appeals will not work. Knowing that the Funds are now obligated to provide life insurance benefits, Rawl and the union would not negotiate a contract requiring Rawl to provide such benefits directly. However, in their next negotiation, BCOA and the union may reverse their 1991 decision, requiring individual employers to resume providing such benefits. This would leave Rawl's retirees with no life insurance benefits -- Rawl would not be signatory to a contract or participant in any Funds which provide such benefits. The reverse could also be true -- Rawl may be obligated to provide life insurance directly to its pensioners and pay for the Funds to do so as well.[5] Again, the collective bargaining process resulting from the lower court's decision simply will not work.

The Trustees' attempt to distinguish *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585 (6th Cir. 1986), falls flat. At issue in *General Tire* and in this case was whether a party had contracted away -- waived -- bargaining rights. In order to determine whether the union in *General Tire* contracted away its bargaining rights, the Sixth Circuit applied the clear and unmistakable waiver test. *Id.* at 588. As demonstrated above, the crux of Rawl's position is that its future bargaining rights have been declared forfeited, not clearly and unmistakably, but rather by simple contract interpretation.

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[5] Because Rawl is already funding the pension plan it negotiated with the union, Rawl may well have to fund, retroactively and prospectively, two pension plans if the decision below stands.

Finally, the Trustees' and BCOA's suggestion that the waiver is not perpetual is misleading. The waiver -- a delegation of bargaining authority -- lasts so long as BCOA wants it to. It is a perpetual power of attorney only terminable by the attorney. It is a convoluted agency where the agent directs the principal. It is the type of precedent which, if allowed to continue, could severely undermine multi-employer bargaining. *See* Pittston's Pet. at 18-19.

3. Amax Coal Does Not Support the Trustees' Arguments

The Trustees suggest that the question of an employer's right to withdraw from multi-employer bargaining is settled by this Court's decision in *Amax*, 453 U.S. 322. Frankly, to the extent *Amax* addressed the issues in this case, it supports Rawl's position.

In *Amax*, "[t]he question at issue [was] whether the employer selected trustees of a trust fund . . . are 'representatives' of the employer 'for purposes of collective bargaining'. . . ." 453 U.S. at 325. This Court held that, since such trustees do not engage in collective bargaining activities, Amax's selection of its bargaining representative had not been unlawfully coerced by the union's strike to force the company to participate in the funds. *Id.* at 335-336. However, the Court implied that its decision would have been different if the management trustees were to "bargain with [union trustees] to set the terms of the employer-employee contract." *Id.* at 336.[2/] In this case,

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[2/] There was no suggestion in *Amax* that anyone other than Amax and the union would negotiate over and set the terms of Amax's participation in the Funds. Nor was there any question that Amax could lawfully withdraw from the Funds.

the designation of Rawl's collective bargaining agent *is* the issue. Here, BCOA is indeed setting the "terms of [Rawl's] employer-employee contract" concerning pension and other benefits. [8/] BCOA is now, once again, Rawl's collective bargaining representative, and as a result of the court of appeals opinion, there is absolutely nothing Rawl can do about it.[9/] Congress' fear that "the identity of those who would represent employers in collective bargaining" would be "dictate[d]" has been fully realized by this case. *Id.* at 335.

4. BCOA's Attempt to Confuse

BCOA paints a picture of a straight-forward contractual obligation from which Rawl walked away. BCOA could not be more wrong on both counts. First, there is nothing straight-forward about an obligation the Trustees manufactured 10 years after the fact. Even the Trustees admit that they did not think up the evergreen theory until 1988 — ten years after it was allegedly negotiated. Br. of Appellees at 42-47. During the ten years from 1978 to 1988 everyone in the coal industry -- the UMWA, the BCOA, the Trustees, Rawl and others -- acted

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[8/] The Trustees declare that "it necessarily follows that the contract binding petitioner to continue to participate in a multi-employer trust is not equivalent to a perpetual designation of BCOA as its agent for multiemployer bargaining or a waiver of petitioner's right to bargain separately." Opp'n at 13. To the contrary, as demonstrated above, that is exactly what it is.

[9/] The 1988 Wage Agreement expired in February and BCOA and the union are attempting to agree on a successor agreement. If the decision of the court of appeals stands, BCOA and the UMWA are, therefore, negotiating right now over the future contributions to be made by Rawl and the future benefits to be given Rawl's employees and retirees.

as if there was no continuing commitment to the Trusts. The Trustees repeatedly went to court and proved that fact without objection from BCOA or the union. *See* Pittston Pet. at 7. Rawl withdrew from BCOA, and BCOA said nothing. Rawl withdrew from the Funds, and the UMWA never said Rawl had a continuing contractual commitment to stay in. Instead, the union signed a contract letting Rawl out. JA 986-995. In the Third Circuit, such conduct would have warranted summary judgment for Rawl. *Teamsters Indus. Employees Welfare Fund v. Rolls Royce Motor Cars, Inc.*, 989 F.2d 132 (3rd Cir. 1993).

BCOA's suggestion that Rawl ratified the evergreen commitment is a bold fabrication. No one ever ratified the evergreen commitment, because nobody ever knew about it. BCOA told no one.[10] Until BCOA's *amicus* brief in this Court, no party to this litigation ever disputed this fact. BCOA's ratification assertion is even more perplexing since, in the same year BCOA alleges Rawl ratified the evergreen commitment, the Trustees: a) were publishing to the industry a withdrawal liability bulletin stating that employers who, like Rawl, became non-signatory to a Wage Agreement no longer had an obligation to contribute to the Funds, *see* JA 1069-1072; and b) were for the first of many times, pursuing an employer similarly situated to Rawl for withdrawal

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[10] BCOA's suggestion that Rawl never said that it was not aware of the so-called evergreen commitment is preposterous. BCOA *amicus* Br. at 19. In the *very document* BCOA cites to state that Morgan Massey was a BCOA board member (he was, in fact, the representative of the *small* coal operators in 1981, not 1978) Mr. Massey states that he was never provided with a copy of the Trust documents and was never aware of an agreement which prohibited withdrawal from the funds. JA 839-840. The truth is that BCOA, throughout years of litigation and even in its *amicus* brief to this Court, has *never* said that it told anyone about this momentous commitment, including Rawl.

liability.[11/] *See* JA 1008. BCOA's effort to cloud rather than amplify the facts serves no useful purpose.

Conclusion

For the reasons stated in its Petition and herein, Rawl respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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[11/] Indeed, in light of Rawl's knowledge that the Trustees had pursued numerous employers for withdrawal liability, Rawl expected and was fully prepared to pay its fair share of withdrawal liability when it withdrew from the Funds.